4161/76 1 127

45509

STEPHEN WINIARSKI, Administrator of the Estate of LA VERGNE WINIARSKI,	)	APPEAL FROM THE
Plaintiff - Appellant,	)	CIRCUIT COURT,
v.	)	COOK COUNTY.
EMIL LOUIS MELKOVITZ and FRED SCHWIND,	)	
Defendants - Appellees.	)	346 I.A. 208

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a wrongful death action under the Injuries Act, Ill. Rev. Stat. 1951, Chap. 70, pars. 1-2. The verdict was not guilty, judgment was entered on the verdict and plaintiff has appealed.

Plaintiff's decedent, a girl fifteen years of age, was struck and killed by Schwind's automobile driven by Melkovitz, about 6:15 P.M. on July 25, 1947. The accident occurred on a highway in Cook County near Des Plaines, Illinois. The automobile was being driven north on the east side of the highway. The decedent was walking south on the shoulder east of the highway with six other girl campers. She was about two or three feet behind the girl ahead of her.

Plaintiff contends the court committed reversible error in instructing the jury. The factual issues for the jury on the elements of plaintiff's case were whether defendant Melkovitz saw the girls before the accident; whether the girls were in single file on the shoulder; whether the automobile was on or off the pavement when it

struck decedent; and whether Melkovitz and his wife were seated apart from each other in the front seat. We do not think it necessary to discuss inconsistencies and contrarieties in the evidence nor to comment upon the impeachment of witnesses nor to decide whether there was a serious conflict in the factual issues.

Instruction number 24 for defendants is peremptory. It states: "If you believe from the evidence, under the instructions of the court, that the degree of care required of said plaintiff for her own safety, as defined in these instructions, required her while walking on said highway . . ." etc. The instruction plainly means by the word "highway" the paved portion. It assumes that plaintiff's decedent was walking on the paved portion. Whether decedent was on the paved portion was a disputed question of fact. If she was not on the paved portion, she did not have the duties attributed to her by the instruction. The instruction refers to decedent as "plaintiff." The plaintiff is decedent's administrator, and was not involved in any of the questions covered by the instruction. Loftus v. Chicago Railways Company, 293 Ill. 475. The giving of this instruction constituted reversible error.

We think that we should comment on other instructions given for defendants and objected to by plaintiff. Number 19, a peremptory instruction, told the jury that decedent's due care could not be assumed but must be proved by a preponderance of the evidence. In a death action where there are no eye-witnesses to the fatal event, the jury is permitted to take into consideration, along with the evidence,

the natural instinct of men to avoid injury and preserve their own lives. This rule in no way shifts the burden of proof, and the instinct does not give rise to a presumption except as against an affirmative act of self-injury or when the impending danger was known to the deceased. Newell v. Cleveland C., C. & St. L. Ry., 261 Ill. 505, 508-11; Collison v. Illinois C. R. R., 239 Ill. 532, 537-8. See Petro v. Hines, 299 Ill. 236, 238. However, the bare statement in the instruction that a failure to prove decedent's due care by a preponderance of the evidence should result in a verdict for defendant might, in this case, be misleading to the jury. Defendants argue that there was an eye-witness who attempted to make this proof. This witness testified only that she saw decedent at the instant of impact. This testimony, without more, did not tend to prove due care.

Instruction number 16 refers to decedent as "plaintiff." It is subject to the same criticism in this respect as number 24. In instruction number 16 as well as in number 22, the jury was told that in order to charge defendant with a duty to avoid injuring the decedent, "plaintiff must show by a preponderance" etc. This could confuse the jury. There is no reason for telling the jury what is necessary to charge negligence.

We need not pass on the other point raised by plaintiff. For error in instructing, the judgment is reversed and the cause remanded for new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR NEW TRIAL.

LEWE AND FEINBERG, JJ. CONCUR.

A
128

45637

BELL AUTO REPAIR AND PAINTING CORPORATION, a corporation, Plaintiff - Appellee, v. OLIVER C. GIDDINGS, Defendant - Appellant.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a tort action for damages arising from the alleged conversion by defendant Giddings of an automobile mortgaged to plaintiff. An ex parte judgment for $494.28 was entered against Giddings following non-service of some defendants and the dismissal of others. The court denied Giddings' motion to vacate the judgment, and this appeal by Giddings followed. The record shows that on February 27, 1950 the case was dismissed by stipulation of the parties. On November 3, 1950 an order was entered vacating the dismissal order of February 27, 1950 "as entered in error." The next order is the ex parte judgment of February 20, 1951.

There is nothing in the record to show that the court had regained jurisdiction of the cause on November 3, 1950 when the order of dismissal of the previous February was vacated. In the absence of such a showing we cannot presume in favor of the order of November 3, 1950 that the court had jurisdiction to enter it. Thirty days had elapsed since the order of dismissal, and there is nothing from which we can determine why that order was "entered in error." People ex rel. Waite v. Bristow, 391 Ill. 101.

Giddings argues in his brief that the reinstatement order and subsequent proceedings were "illegal and improper." He made the point in the petition to vacate. We conclude that the trial court was without jurisdiction to vacate the order of dismissal of February 27, 1950, and that accordingly all the proceedings thereafter are void. The judgment must be reversed, though Giddings' petition to vacate disclosed no meritorious defense.

JUDGMENT REVERSED.

LEWE AND FEINBERG, JJ., CONCUR.

A

129

45566

BENJAMIN McMICHAEL and REBECCA McMICHAEL, Appellants, v. JACOBS CLOTHING COMPANY, PHILLIP BARASCH, d/b/a INTERNATIONAL ADJUSTMENT COMPANY, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs from the order vacating a judgment by default after the statutory term of court had expired. The cause came on regularly for hearing on March 2, 1951, before the trial court without a jury. No one appeared for the defendants upon the call of the case. Both had been in default for failure to file an answer to an amended statement of claim. A judgment for $500 was entered against both defendants. On April 2, 1951, defendant Barasch filed a petition and motion to vacate the judgment by default, which was denied. Defendant Jacobs filed a petition on April 26, 1951, to vacate and set aside the judgment, to which plaintiffs filed a motion to strike or dismiss for want of jurisdiction. The motion to strike or dismiss was denied, the petition of Jacobs allowed, and the judgment of March 2, 1951, vacated.

The only question presented is whether the petition of Jacobs satisfies the rule applicable to motions in the nature of writ of error coram nobis. This rule is fully stated in Jacobson v. Ashkinaze, 337 Ill. 141, at p. 146:

> "The purpose of the writ coram nobis at common law, and of the statutory motion substituted for it in this State, is to bring before the court rendering the judgment matters of fact not appearing of record, which, if known at the time the judgment was rendered, would have prevented its rendition. Illustrations of such matters are the disability of the parties to sue or defend, the failure of the clerk to file a plea or answer, and the omission to interpose, through fraud, duress or excusable mistake and without negligence on the part of the defendant, a valid defense existing in the facts in the case. The motion is not available to review questions of fact which arise upon the pleadings or to correct errors of the court upon questions of law. * * *" (Italics ours.)

This court followed the rule stated, in Wagner v. Sulka, 336 Ill. App. 101.

The petition in the instant case alleged that petitioner was injured in January, 1951, and was unable to appear in court on March 2, 1951, on which date judgment was entered; that when he was served with summons he delivered the same to defendant Phillip Barasch and directed him to employ counsel for the purpose of defending said cause; and that petitioner did not know said Barasch had failed to employ an attorney to defend the cause and was unaware of the cause having been set for trial on March 2, 1951, he having been previously informed that said cause had been set for trial on April 13, 1951. It then alleges that petitioner has a good and meritorious defense to the whole of plaintiffs' claim. The defense termed meritorious is nowhere set up in the petition.

The alleged failure of petitioner's agent, Barasch, to employ a lawyer to defend the cause is analogous to the failure of the agent in Wagner v. Sulka, supra, and Bonn v.

Arth, 331 Ill. App. 321, where it was held that the neglect of the agent to employ a lawyer furnishes no ground for a motion in the nature of a writ of error coram nobis.

The instant petition did not set up any defense, valid or otherwise, as required. Jacobson v. Ashkinaze, supra; People v. Bristow, 391 Ill. 101, 116.

For the reasons stated the order appealed from is reversed.

REVERSED.

KILEY, P.J. AND LEWE, J., CONCUR.

45480

JULIUS KELLY, Plaintiff - Appellee, v. CHARLES KELLY, d/b/a. CICERO PRESSING MACHINE SERVICE, Defendant - Appellant.	APPEAL FROM COUNTY COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for services rendered to defendant by plaintiff as a pipe fitter. Defendant answered that plaintiff had been fully compensated for his services, and filed a counterclaim alleging that at the special instance and request of the plaintiff he advanced certain moneys in behalf of the plaintiff. On plaintiff's motion the counterclaim was stricken and leave given to file an amended counterclaim. After filing of the amended counterclaim the trial court entered the following order on December 1, 1950:

> "This cause coming on to be heard on motion of the Counter-Defendant, Julius Kelly, to dismiss the counterclaim heretofore filed by Charles Kelly, doing business as Cicero Pressing Machine Service, and on the motion of Charles Kelly, defendant, to dismiss the plaintiff's complaint at law and the court being advised in the premises;
>
> "It Is Hereby Ordered That
>
> 1. The counterclaim filed by Charles Kelly is hereby dismissed.
>
> 2. The motion to dismiss the plaintiff's complaint at law is hereby denied.
>
> "Enter:
>
> (Signed) Frank A. Oakley
> Acting County Judge of Cook County."

On February 7, 1951, defendant and counterclaimant's motion to vacate the order entered December 1, 1950 dismissing his counterclaim was denied. Defendant appealed from the orders entered December 1, 1950 and February 7, 1951.

In this court plaintiff filed a motion to dismiss the appeal on the ground that that part of the order appealed from entered December 1, 1950, which reads: "The counterclaim filed by Charles Kelly is hereby dismissed," is not a final order. This motion was taken with the case.

In the recent case of Aetna Plywood and Veneer Co. v. Robineau, 336 Ill. App. 339, this court held that an order in substantially the same language as here was not a final judgment order within the meaning of Section 77 of the Civil Practice Act. In that case at page 343, adverting to the case of Board of Education of Grant Community High School Dist. No. 121 v. Board of Education of Richmond-Burton Community High School Dist. No. 157, 301 Ill. App. 228, the court said:

> "Where a motion to dismiss a complaint, which is in the nature of a demurrer, is sustained, for such ruling to become final, a judgment should be entered for the defendant to the effect that the plaintiff take nothing by virtue of such action and that the defendant go hence without day, or words of similar import and meaning."

The order here in controversy fails to survive the test announced in the case last cited and we are therefore impelled to allow the plaintiff's motion to dismiss the appeal.

For the reason given, the appeal is dismissed.

APPEAL DISMISSED.

KILEY, P.J., AND FEINBERG, J. CONCUR.

A 131

45533

RUTH ACHILLI and GERTRUDE A. GROMER, doing business as ELGIN ACCEPTANCE COMPANY, Appellants,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
PAUL M. ALONGI, Appellee.	

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action of replevin against defendant to recover possession of a Chrysler automobile, on the ground that defendant defaulted in monthly payments due under the terms of a conditional sales contract. Trial by the court without a jury resulted in a finding and judgment in favor of defendant and assessment of damages against the plaintiffs in the sum of $750. Plaintiffs appeal.

The history of the transaction may be briefly stated. Defendant Alongi agreed to purchase a Chrysler automobile owned by one Tony La Franka for the sum of $3,600. At that time La Franka owed a balance of $1,800 on his automobile to a bank. The bank refused to extend credit to defendant. In order to consummate the sale La Franka and defendant executed a conditional sale contract. Defendant also executed a promissory note in the sum of $2,119.24 payable to the order of La Franka in eighteen monthly installments of $122.18 each. The note is incorporated in and made a part of the conditional sale contract by reference. Upon La Franka's assignment of the contract to plaintiffs, doing business as Elgin Acceptance Company, plaintiffs paid La Franka's obligation to the bank. The conditional sale

contract, assignment, and note all appear on one page of a printed form furnished by plaintiffs and were executed simultaneously by La Franka and defendant on November 15, 1948. Monthly payments were made by defendant to plaintiffs as provided in the promissory note until October 4, 1948 when his check for $200 was returned "Not Sufficient Funds." Some time after this check was returned defendant informed plaintiffs that no further payments would be made. Defendant used the automobile in question in his decorating business and for livery service. He had possession and use of the automobile from about November 15, 1948 until it was replevined by plaintiffs on March 23, 1950. At the time it was replevined defendant had paid plaintiffs $766.54 and owed a balance on the promissory note of $1,558.02.

The record shows that the trial judge rested his decision on the following grounds: That the conditional sales contract is invalid; that plaintiffs are not the holders of the contract and note in due course; and that La Franka made certain fraudulent representations.

Defendant says that the document which purports to be a conditional sale contract is of no force and effect because essential provisions of the agreement with respect to price and terms of payment do not appear in the contract. The contract names La Franka as seller and Alongi as purchaser; it describes the make of the automobile, type of body, model number, manufacturer's serial number, motor number, and the year model. It recites that "The purchaser agrees to make deferred payments in accordance with the

terms of a certain promissory note of even date herewith executed by the purchaser and made payable to the seller in monthly installments * * *. To induce the seller to deliver possession of said car to the purchaser the purchaser agrees, covenants and warrants as follows, viz.; that the title to the above described automobile shall not pass to the purchaser until all installments of said note are paid in full and until the payments shall have been made said automobile shall remain the property of the seller." The contract further provides that if the purchaser shall fail to pay the note or any installment thereon the seller may take possession of the automobile and the holder of the note may declare it due and payable.

Although the contract does not state the full purchase price we think that is immaterial since the note which is referred to in the contract is sufficient, even though it is only part of the consideration to support the contract. Moreover, defendant is not prejudiced and plaintiffs, who stand in the shoes of La Franka by virtue of the assignment, are not complaining. The contract contains all the essential elements. It provides that the title to the automobile is retained in the seller; that payment of part of the purchase price represented by the promissory note is to be made at fixed periods in the future, and that upon all the payments being so made title passes to the defendant as purchaser.

The assignment executed by La Franka transfers to plaintiffs all of his "right, title and interest in and to the property" described in the contract. It is admitted

that the signatures of defendant and La Franka on the contract, assignment and note are authentic and that these documents were delivered to plaintiffs.

In our opinion the assignment is valid and plaintiffs are the legal owners of the contract which is the basis of the present action.

Defendant insists that he was induced to purchase the automobile in question by La Franka's fraudulent representation that it was a 1948 model. He testified that in "the summer of 1948" he first learned that it was a 1947 model when he left the automobile with a used-car dealer for the purpose of selling it at the original purchase price. There was testimony that the 1947 and 1948 models of the Chrysler Crown Imperial were similar in appearance and that the only way they could be distinguished was by the manufacturer's serial number. An automobile dealer called by the defendant testified that the "Official Guide" or "Blue Book" used by automobile dealers shows that the 1948 Chrysler Crown Imperial models such as here involved started at manufacturer's number 7810908. Defendant's automobile bears manufacturer's number 7810895. In other words the number of the automobile in this case is thirteen numbers earlier than that which marks the beginning of the 1948 model. Even so, does this fact justify the defendant in refusing to pay the monthly installments? We think not. Defendant had possession and use of the automobile for nearly a year before he refused payment. The question whether defendant retained the automobile longer than was reasonably

necessary depends upon all the facts and circumstances and is generally a question for the jury, or for the court where the jury is waived as here, to determine but where all reasonable minds would agree that the automobile was retained under such conditions that there would be a waiver of the right to rescind then it presents a question of law for the court. See Connor v. Borland-Grannis Co., 294 Ill. 258.

Here the defendant's evidence shows that he could have readily ascertained whether the alleged fraudulent representation was true or not at the time he purchased the automobile or immediately thereafter by consulting any reputable automobile dealer, but he failed to do so. In the meantime there was a substantial diminution in the value of the automobile by reason of its use and the lapse of time. And to avert further depreciation during the pendency of the present case the trial court, on February 6, 1951, entered an order which recites that "It appearing to the court that the automobile herein replevined is depreciating in value and that it would be for the best interests to have said automobile sold under the terms of the contract herein sued upon, it is therefore ordered that plaintiff proceed to sell said automobile herein replevined and that he hold the proceeds subject to the further order of the court * * *."

Under the circumstances shown we hold as a matter of law that defendant waived his right to rescind the contract and was therefore bound to make payments according to the terms of the contract.

The record further shows that the judgment order here appealed from, entered March 12, 1951, directs that "a writ of retorno habendo do issue for the return of the property to the defendant." This order and the order of February 6, 1951 directing the sale of the automobile are inconsistent. Since there is no evidence to the contrary, we assume that in compliance with the order of February 6, 1951 the automobile in question was sold.

For the reasons given, the judgment in favor of the defendant and against the plaintiffs is reversed and the cause is remanded with directions to enter judgment in favor of the plaintiffs.

REVERSED AND REMANDED
WITH DIRECTIONS.

KILEY, P.J. AND FEINBERG, J., CONCUR.

45629

A 132

CHARLES C. BANKO, Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
HAROLD KRIST, FRED BRUINING, WILLIAM BABCOCK and EDWARD HREJ, Appellees.	)	OF CHICAGO.

346 I.A. 211

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff instituted two actions in forcible detainer to recover possession of the building known as 534 West 120th Street in the City of Chicago. The premises in controversy consist of a store and two three-room apartments above the store. Afterward the two causes were consolidated and trial by the court without a jury resulted in a finding and judgment in favor of the defendants. Plaintiff appeals.

From February 7, 1947 to April 30, 1951, defendants Krist and Bruining occupied the premises under the terms of a written lease. The lease contained an option for renewal. Before the termination of the lease Krist notified plaintiff that he would surrender possession of the entire premises. About three days before the lease expired plaintiff received the keys to the store. Defendants Babcock and Hrej subleased the apartments from the lessees.

According to plaintiff's testimony the second floor of the premises here involved originally consisted of one seven-room apartment. In May 1948 the former owner of the building converted this apartment into two separate units.

The conversion was made by installing an additional bathroom and kitchen. The kitchen was equipped with a sink and cabinets and each apartment was furnished with a gas stove and refrigerator. A partition was also erected between the apartments, thus making each of them separate and distinct living units. No testimony was introduced in behalf of defendants.

The principal question presented for determination is whether the alterations made in the premises in question amounted to a conversion within the meaning of Section 202(c)(3) of the Controlled Housing and Rent Act of 1947, Public Law 464, 80th Congress, Second Session, 50 U. S. C. A. Appendix, § 1892 (c) (3), which reads:

> "(c) The term 'Controlled Housing Accommodations' means housing accommodations in any defense-rental area, <u>except that it does not include</u>—
>
> * * * * * * * * *
>
> "(3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, * * * <u>or which are additional housing accommodations created by conversion on or after February 1, 1947</u>." (Italics ours.)

Defendants insist that there is no evidence tending to show a conversion within the meaning of the foregoing provision. The actual cost of making the conversion does not appear from plaintiff's evidence but we think that is immaterial. It is not denied that additional accommodations were in fact created. In our view it is fair to assume that considerable labor and material was used in making the change. Even though the conversion were accomplished at a negligible cost it is sufficient to remove the apartments from control under the statute. See <u>Woods</u> v. <u>Baker</u>, 84 Fed. Supp. 339.

In Flynn v. Woods, 181 Fed. 2d, 867, it appears that the alterations there were made to convert a flat into two apartments as here by constructing a permanent wall separating the units and adding an additional kitchen. The court held that the answer to the question whether additional housing accommodations had been created cannot be made to depend entirely upon the extent or cost of the structural work done. Whether additional housing accommodations have been created by conversion must depend upon the facts in each particular case. In the instant case the uncontroverted evidence clearly shows that there was a conversion within the meaning of the statute.

Defendants say that Krist was not a necessary party because he relinquished possession of the premises by delivery to plaintiff of the key to the store portion of the building. Krist and Bruining leased the entire building. The statement of claim filed by plaintiff alleges that Krist with the other named defendants unlawfully withhold possession of the apartments on the second floor. There is no evidence tending to show that Krist relinquished possession of the entire building. Under these circumstances we think he was a proper party.

Failure of the lessees Krist and Bruining to exercise their option to renew the lease entitles plaintiff to maintain the present action. Defendants Babcock and Hrej, sublessees, are not tenants of plaintiff. He did not deal with them. Since there is no privity of contract between them and plaintiff the right of possession of the subtenants terminated upon the expiration of the lease. The Forcible Entry and Detainer Act, Chapter 57, Section 16, Illinois

Revised Statutes 1951, Volume 1, State Bar Edition, authorizes the bringing of an action against the lessee with others in whom actual possession is divided at the commencement of the suit. It gives a landlord a joint action against the lessee and those holding under him whenever the subtenants hold possession without right. (Wieboldt v. Best Brewing Co., 163 Ill. App. 246.)

For the reasons given, the judgment is reversed and the cause is remanded with directions to enter judgment in favor of the plaintiff.

REVERSED AND REMANDED
WITH DIRECTIONS.

KILEY, P.J. AND FEINBERG, J., CONCUR.

45520

IRENE A. WILKINS and EMMA CLANCY, Appellees,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
WILLIAM F. PAUL, Appellant.	)	OF CHICAGO

346 I.A. 212

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Irene A. Wilkins and Emma Clancy filed a statement of claim in the Municipal Court of Chicago against William F. Paul, alleging that they are entitled to the possession of Apartment 3F at 1322 West 79th Street, Chicago, which defendant unlawfully withholds from them. A trial before the court resulted in a finding and judgment in plaintiff's favor. Defendant appeals. Plaintiffs have not filed an appearance or briefs.

Defendant had a written lease with Irene Muellner and Emma C. Clancy for the term commencing October 1, 1946, and expiring September 30, 1947. The record is silent as to the kind of tenancy under which defendant occupied his apartment on expiration of the written lease. On January 12, 1948, Irene Clancy Muellner, a widow, by deed of trust conveyed the premises to the Drovers Trust and Savings Bank, as trustee. Among the powers of the trustee was that of leasing the property or any part thereof from time to time. On that date the Bank entered into a trust agreement with Emma C. Clancy, Irene Clancy Muellner and Raymond J. Clancy, as beneficiaries. On November 4, 1950, Emma Clancy, one of the plaintiffs, gave written notice to defendant that his tenancy would terminate on December 31, 1950, and that he would be required to surrender

possession to her on that date.

Defendant's theory for reversal is that plaintiffs, some of the beneficiaries, were not the proper parties to bring this action and that the action should have been brought by the trustee. We agree with this position and have so held in several cases. See Liberty National Bank v. Kosterlitz, 329 Ill. App. 244; Chicago Title & Trust Co. v. Mercantile Trust & Savings Bank, 300 Ill. App. 329; Barnett v. Levy, 331 Ill. App. 181, (Abst.); Handler v. Alpert, 331 Ill. App. 405, (Abst.); Beach v. Boettcher, 323 Ill. App. 79; Marshall v. Solomon, 335 Ill. App. 302; and Lowenstein v. Chicago Title & Trust Co., 340 Ill. App. 160.

For this reason the judgment of the Municipal Court of Chicago is reversed and the cause is remanded with directions to enter judgment against the plaintiffs.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, J., and NIEMEYER, J., Concur.

45384

M. BACKALL et al. Appellants,	APPEAL FROM
v.	CIRCUIT COURT,
5482 UNIVERSITY AVENUE APARTMENTS BUILDING CORPORATION, and WILLIAM HENNING RUBIN, Appellees.	COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Twenty-two tenants of the 5482 University Avenue Apartments Building Corporation filed their original complaint January 20, 1950 in the Circuit Court of Cook County seeking damages for rental overcharges from the landlord corporation and its managing agent. January 27, 1950 the court entered an order striking count one, and continued the hearing to strike counts two and three. Thereupon plaintiffs filed an amended complaint which consisted of four counts asking (1) treble damages under section 205 of the Housing and Rent Act; (2) refund of payments of retroactive rent increases; (3) as alternative to treble damages, ordinary damages for fraud of landlord in procuring increase of rent ceilings; and (4) treble damages for failure to give services during year prior to suit and ordinary damages for failure to give services during period preceding one year prior to suit. On February 17, 1950 the court dismissed count one as amended, and granted leave to file an amended complaint as to counts two and three. March 4, 1950 plaintiffs filed an amended complaint, and on March 13 defendants moved to dismiss the amended complaint, principally on the ground that the court

lacked jurisdiction to challenge the order of the Housing Expediter and for the additional reason that plaintiffs had not exhausted their legal remedies by an appeal as provided under the regulations of the act. After defendants obtained leave on May 24, 1950 to file a supplemental amendment to their motion to dismiss, plaintiffs on June 3 filed their reply to the supplemental motion. Finally, on June 20, 1950, on motion of defendants, the court entered an order dismissing the suit for want of jurisdiction, from which plaintiffs appeal.

The amended complaint alleges in substance that plaintiffs had previously occupied their apartments under voluntary leases providing for 15 per cent increases over previous ceilings, and that following the termination of these leases on December 31, 1948 plaintiffs continued to occupy their apartments on a month-to-month basis; that on May 27, 1949 each plaintiff received a notice terminating his month-to-month tenancy as of July 1, 1949, which stated that if the tenant did not vacate the premises he would be subject to a retroactive rent increase based on a petition for a rent increase being filed by the landlord on May 27, 1949 with the office of the Housing Expediter; that plaintiffs did not respond to these notices and continued to pay monthly rent in the usual manner; that defendants did not actually file their petition for a rent increase until June 13, 1949; and that the first notice thereof was received by plaintiffs on October 27, 1949, when they were advised by the Housing Expediter that plaintiffs might inspect the petition and

evidence submitted by the landlord and file their objections thereto. The plaintiffs thereupon objected, inter alia, that the heating fuel expense of $5670.73 claimed by the landlord was fraudulent and should be no more than $2349.00; that on December 19, 1949, notwithstanding these objections, the Area Rent Director increased the rental ceilings approximately 20 per cent over and above a prior increase of 15 per cent obtained by the landlord under the statutory-lease provisions of the Rent Act; that at no time were plaintiffs given an opportunity to inspect the evidence submitted by the landlord, and that the Federal rent office was deceived by false vouchers submitted on behalf of a coal company controlled by the managing agent of the landlord corporation; that following the order of the Rent Director increasing the rent ceilings, the landlord, without giving thirty-day notices of termination, served five-day rent demands upon the plaintiffs for increased current rentals, as well as the retroactive increases back to July 1, 1949, and that plaintiffs complied with these demands, paying under protest; that about January 10, 1950 plaintiffs appealed for relief against defendants' alleged fraud to Tighe Woods, Housing Expediter at Washington, D. C., and on January 20, 1950 plaintiffs filed their action in the Circuit Court for treble damages predicated on defendants' fraud in securing an increase in the rent ceilings; that on April 12, 1950 Woods denied the appeal of plaintiffs, relying solely upon the record before him, and without requiring defendants to submit their vouchers for further examination as requested by plaintiffs; that on

May 25, 1950 defendants filed a supplemental motion in the Circuit Court to dismiss plaintiffs' action at law on the basis of the rejection by Woods of plaintiffs' appeal; that on June 3, 1950 notice was received by plaintiffs that the office of Housing Expediter decided to reopen the case, and on the same day plaintiffs filed their answer to the supplemental motion to dismiss, praying that it be overruled or, alternatively, suggesting that the court action be suspended pending a decision on the reopened case.

The gravamen of plaintiffs' case is the alleged fraud practiced by defendants in obtaining a new rental ceiling by submitting false vouchers of the expenses to the office of the Housing Expediter. Specifically, they contend that the heating fuel expense of $5670.73 claimed by the landlord as a basis for rent increases was fraudulent in that a coal company affiliated with the defendant submitted padded coal bills in the foregoing amount, whereas the actual value of the coal furnished should have been no more than $2349.00. The only allegations in the amended complaint with reference to claimed fraud on the part of the landlord appeared in count one of the amended complaint. Plaintiffs submitted written objections to the petition of the landlord which contain all the claimed fraudulent acts of defendants. In an opinion and order of Tighe E. Woods, Housing Expediter, granting appeal in part and denying appeal in all other respects, it is stated that "subsequent to April 12, 1950, further investigation was made into the facts set forth in the original petition filed by the landlord in the Area Rent

office on June 13, 1949; * * * [that] the figures submitted by the landlord were reaudited by the Housing Expediter's accountants and all appropriate adjustments were made. The reaudit resulted in establishing that the landlord is entitled to an increase in rent amounting to 10.97% of the annual rent roll instead of 19.87% as granted by the Area Rent Director. Upon independent examination of the pertinent evidence in the record, and after careful consideration of all of the arguments and evidence advanced by the parties, the Housing Expediter finds that the appeal should be granted in part by establishing the dollar amount of the rent adjustment to which the landlord is entitled at $1,733.30, or, 10.97% of the annual scheduled rents," and accordingly the appeal was: "1. Granted in part by modifying all the orders entered by the Rent Director on December 19, 1949 * * * so as to establish the rents for the subject units effective June 13, 1949, as set forth in Schedule A attached hereto; and, 2. Denied in all other respects."

As the principal ground for reversal plaintiffs contend that a court of general jurisdiction has power to disregard orders obtained by fraud in ex parte proceedings, and that they are entitled to an award of either treble damages under section 205 of the Housing and Rent Act of 1947 or ordinary damages at law where defendants collected additional rents on the basis of rent ceilings obtained through fraud practiced on the rent director. From the pleadings and documents of record, the fraud charged was disclaimed on appeal. Consequently, there is no validity to the legal contention made in count one that alleagtions

that defendants' petition for an increase of rentals contained untrue statements, vested the State court with jurisdiction to review, alter, modify or disregard an order of the office of the Housing Expediter. The law is well settled that a defense director in a defense rental area acting for the Housing Expediter has exclusive jurisdiction to determine the maximum legal rent that may be charged for housing accommodations, and a State court has no jurisdiction to do anything other than to enforce the rent as fixed by the rent director (Zaker v. Lapa, 332 Ill. App. 602; Wasservogel v. Meyerowitz, 300 N.Y. 125; Schnoll, Inc., v. Federal Reserve Bank, 286 N.Y. 503); and plaintiffs having submitted written objections to the petition of the landlord which contained all the claimed fraudulent acts of defendants, that issue having been decided adversely to them, they cannot retry it in a State court.

The authorities are generally in accord that even under allegations of fraud tenants are required to exhaust their administrative remedies before they seek the intervention of a State court. Gates v. Woods, 169 F.2d 440; Smith v. Duldner, 175 F.2d 629. Plaintiffs argue that where the administrative remedy is futile, inadequate or not binding the doctrine of exhaustion of administrative remedies will not be invoked, but the facts do not justify the application of that doctrine. The pleadings and documents of record in this case show that these proceedings were instituted while their appeal to the office of Tighe E. Woods in Washington, D.C., was still pending and before it

had been ultimately decided; therefore, we think the Circuit Court properly held that it lacked jurisdiction to grant plaintiffs the remedy sought. Accordingly, the order of the Circuit Court dismissing the suit at plaintiffs' costs is affirmed.

ORDER AFFIRMED.

BURKE, P.J., and NIEMEYER, J., Concur.

45449

ISADORE, ABE and SIDNEY SUGAR, doing business as NORTHWESTERN FLOUR & FEED COMPANY, Appellants,	APPEAL FROM
v.	MUNICIPAL COURT
JOSEPH LOGALBO, Appellee.	OF CHICAGO

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed suit to recover a deficiency due under a chattel mortgage sale and to recover damages for the wrongful disposal of certain property described in the mortgage. The court found for defendant on the ground that plaintiffs had not, at the time of the transaction, registered their trade name with the County Clerk, and entered judgment accordingly, from which plaintiffs appeal.

In deciding the case the court followed the rule previously announced in Mickelson v. Kolb, 337 Ill. App. 493. Since the trial, the Supreme Court of Illinois in Grody v. Scalone, 408 Ill. 61 (opinion filed 11-27-50, rehearing denied 1-15-51), has held that failure to register a trade name does not deprive one of his cause of action. That is now the settled rule in this state.

In the case at bar there is the further factor that the chattel mortgage and note were payable to the individual plaintiffs with the additional descriptive words "doing business as Northwestern Flour & Feed Company," indicating

that there was no attempt whatever to conceal the identity of the true owners.

Accordingly, the judgment of the Municipal Court is reversed and the cause is remanded for trial on the merits.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P. J., and NIEMEYER, J., Concur.

45525

A-
136

HARRY E. JAFFE, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT
MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION, a corporation, Appellant.	)	COOK COUNTY

MR. JUSTICE KIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for $573.34 entered against it by the court in plaintiff's action on a health and accident insurance policy, after striking defendant's answer and counterclaim.

The complaint alleges the issuance of the policy on January 20, 1934; that "plaintiff has kept, performed and observed all conditions precedent on his part to be kept, performed and observed, except insofar as the same have been waived by the defendant"; that plaintiff sustained a heart attack and thereby became wholly, totally and permanently disabled. By its amended answer defendant alleges that the policy lapsed and became ineffective for any purpose whatsoever on February 1, 1950 by reason of plaintiff's failure to pay the quarterly premium which was due on or before February 1, 1950; that plaintiff neither paid a premium nor tendered any payment thereof until in September 1950 when a tender of a quarterly premium of $18 was made; that this tender was rejected by the defendant; denies that the policy was in full force and effect when plaintiff sustained his heart attack in June 1950 and became disabled and hospitalized; that the waiver of premium clause in the policy referring

to waiver of further premiums when the insured's claim for permanent total disability has been filed and approved while the policy is in force, is ineffective, since plaintiff's disability occurred more than four months after the policy had lapsed for nonpayment of the quarterly premium due February 1, 1950; admits that on or about August 17, 1949 defendant mailed to plaintiff its check for $326.66, purporting to be for benefits under the policy, and alleges that such payment was made through an error of its claim clerk in failing to note that the policy had lapsed; that in accepting said check, plaintiff signed a nonwaiver agreement reciting that said check "shall constitute a release to said Association for the period represented thereby but shall not be construed as a waiver of any of the Association's rights nor as an admission of liability; nor shall such payment prevent the Association from later ceasing payments on said claim if liability has terminated." Defendant also filed an amended counterclaim for the recovery of the $326.66 paid through mistake. Motions to strike the amended answer and amended counterclaim were sustained and, defendant standing on its pleadings, judgment was entered. Defendant appealed. The amount of the judgment is not contested. On oral argument defendant's counsel did not endeavor to sustain the counterclaim, suggesting that the amount involved was comparatively small and of no great importance. We have not considered the appeal relating to the counterclaim, and affirm that part of the order.

Plaintiff's motion to strike the amended answer is based on the alleged estoppel of defendant to contest its

liability under the policy because of the payment to plaintiff of said sum of $326.66, and further, that it affirmatively appears that the alleged forfeiture of the policy was waived by the defendant. The principle governing estoppel has been frequently and clearly stated by our courts. In Northwestern Mut. Life Ins. Co. v. Amerman, 119 Ill. 329, in which the plaintiff was insisting that the insurer was estopped to deny that the policy was in full force and effect by reason of having accepted a premium after the alleged forfeiture or lapsing of the policy, the court said (p. 336):

> "It is to be observed, that it is the effect upon the insured that gives vitality to the estoppel, rather than the purpose or intent of the insurer, and unless the conduct of the insurer has in some way misled the assured, or induced him to do some act or neglect to do some thing to his prejudice, in reliance upon the acts or declarations of the insurer, there can be no estoppel."

The rule was tersely stated in Zurich Accident Ins. Co. v. Industrial Comm., 325 Ill. 452, 458, where the court said:

> "The doctrine of estoppel is invoked to prevent injustice or a fraudulent result. (Lutheran Church v. Lutheran Church, 316 Ill. 196; Sherer-Gillett Co. v. Long, 318 id, 432.) There can be no estoppel where there is no loss, injury or damage."

No loss or damage to plaintiff or change of position by him to his disadvantage by reason of the payment made by defendant under the policy appears from the pleadings in this case. The objection of estoppel of defendant is not supported by the record. If there is a distinction between estoppel and waiver on the record before us, there is nothing in the pleadings to which the doctrine of waiver can be applied

except the payment of the above sum. The court erred in sustaining the motion to strike the amended answer.

The judgment is reversed and the cause remanded for further proceedings in accordance with the views expressed herein.

REVERSED AND REMANDED.

BURKE, P. J., and FRIEND, J., Concur.

45487

141

EARL A. SANBORN, Plaintiff-Appellee, v. ROY G. BLANKENHEIM, et al., Defendants, ROY G. BLANKENHEIM, Appellant.	APPEAL FROM SUPERIOR COURT COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Earl A. Sanborn filed an amended complaint in chancery in the Superior Court of Cook County against Roy G. Blankenheim, John Grossbauer, The Mutual National Bank of Chicago, as Trustee, and Mildred B. Dunn, alleging that on August 21, 1948, he entered into Articles of Agreement with the Marquette National Bank to purchase real estate improved with a six apartment building and four garages, located at 1409-11 East 67th Place, Chicago, for $40,000; that he paid $5,350 in cash and was credited with $5,012.53 for real estate taken in exchange; that he assumed a first mortgage of $22,598.50; and that he agreed to pay the balance of $7,038.97 and interest in monthly installments of $136, such payments to include principal and interest. The complaint further represented that Blankenheim acted as real estate broker and received commissions in connection with the sale of the real estate to plaintiff and the sale of the real estate to the Marquette National Bank; that Blankenheim, for the commissions received, agreed to manage the property

without charge to plaintiff; that beginning about August 21, 1948, Blankenheim collected the rents and disbursed the income from the property; that he was charged with the duty of making payments on the first mortgage and the installment payments provided by the Articles of Agreement; that on March 20, 1950, plaintiff and his wife, at the request of Blankenheim, executed a quit claim deed and assignment of the Articles of Agreement to Mildred B. Dunn as security for the repayment of an indebtedness of $801.93 due from plaintiff to Blankenheim in connection with the management of the premises; that Mildred B. Dunn was an employee in the office of Blankenheim and acted as a "dummy" for the purpose of receiving the deed and assignment as security; that during all pertinent times plaintiff occupied an apartment in the premises; that plaintiff's sister also occupied an apartment therein; that for the purpose of meeting the expenses of operation and the mortgage payments, plaintiff contributed to Blankenheim as managing agent a sum equal to the monthly rental of an apartment; that his sister did the same; and that as part of the security of the debt owing by plaintiff to Blankenheim, and at the latter's request, a lease was executed covering plaintiff's apartment, wherein Mildred B. Dunn appears as lessor and plaintiff as lessee.

The complaint further states that on May 24, 1950, Blankenheim demanded payment of the amount due him; that he told plaintiff that it was only because he, Blankenheim, was "keeping the holder of the mortgage satisfied" that it was not being foreclosed; that Blankenheim asked for authority to sell the property so that he could be paid the money due

him, and plaintiff could "liquidate his investment"; that plaintiff, relying upon such representations, signed a letter authorizing Mildred Dunn to sell the property; that without the knowledge of plaintiff Blankenheim caused the quit claim deed from plaintiff and his wife to Mildred Dunn to be recorded on May 23, 1950; that by mesne conveyance and assignments the real estate was conveyed to The Mutual National Bank of Chicago, as Trustee; that on August 18, 1950, that bank, as Trustee, conveyed the real estate to John Grossbauer; that on August 16, 1950, Mildred Dunn also gave a quit claim deed covering the real estate to John Grossbauer; that plaintiff had no knowledge of the conveyances or pretended sales to Grossbauer until on or about August 28, 1950, at which time Blankenheim told plaintiff that he had sold the property and that the sale might result in an amount of $3,500 for plaintiff after all expenses were paid; that the sale to Grossbauer was never authorized or approved by plaintiff; and that The Mutual National Bank of Chicago, as Trustee, and Grossbauer, at the time they acquired title to the real estate, knew that plaintiff was the sole beneficial owner thereof. The complaint also alleged that plaintiff, his wife and family continued to occupy the real estate as their residence and that Blankenheim took the acknowledgement of plaintiff and his wife in the quit claim deed to Mildred Dunn at a time when he, Blankenheim, was financially interested in the real estate. Purguant to order of court Rose Sanborn, the wife of plaintiff, joined as a party plaintiff and adopted substantially all of the allegations of the amended complaint. As an additional allegation she stated that one half of the

consideration paid for the real estate constituted her funds and property. She also alleged that she did not know about the execution of a lease to their apartment from Mildred Dunn, as lessor, to her husband, as lessee, until about the time of the filing of the complaint. Plaintiffs pray that the court decree them to be the owners and holders of the Articles of Agreement; that the deed to John Grossbauer be declared of no effect and a cloud on their title; that the quit claim deed and assignment to Mildred Dunn be declared to be a deed in the nature of a pledge; that the court find the amount that may be due Blankenheim, which plaintiffs offer to pay; that defendants be enjoined from instituting or prosecuting any suits for the collection of rents or for the possession of any part of the premises; that during the pendency of the cause plaintiffs be authorized to collect the rents and to pay the operating expenses and mortgage and contract payments; and that in the alternative the court appoint a receiver with authority to collect the rents and income during the pendency of the suit. For convenience unless otherwise noted, Blankenheim will be called defendant.

On November 9, 1950, Roy G. Blankenheim and Mildred B. Dunn filed their answer, admitting that plaintiffs agreed to purchase the real estate for the amount stated; that defendant acted as broker; that he managed the premises and the conveyances and assignments; denied any right of homestead in plaintiffs; denied any fraud, malice or wrongdoing; denied that any assignments, documents or deeds were executed or delivered as security for any moneys due defendant;

and stated that the conveyances and transfers were made and delivered for valuable considerations and as an absolute and complete transfer of title and interest by plaintiffs. Further answering, they denied all other allegations and asked that the complaint be dismissed.

While the cause was at issue and on January 8, 1951, the attorney for plaintiffs filed a petition in his own name, stating that defendant testified under oath that plaintiff was indebted to him in the sum of $3,200; that plaintiffs gave a quit claim deed and an assignment of the contract to Mildred B. Dunn as the nominee of defendant upon the agreement that if plaintiff failed to repay defendant the amount owing to him within 60 days, the real estate would be forfeited to defendant; that "upon the said Blankenheim's own sworn statement," the giving of the quit claim deed and assignment constituted a mortgage to secure the debt due from plaintiff to defendant; that defendant testified that the maximum amount owing to him was $3,600; that the attorney for Blankenheim and Dunn stipulated that Blankenheim received and retained for his personal benefit the sum of $7,868.31 from the proceeds of the sale of the real estate; and that upon the testimony of defendant "it is without question" that no less than $4,268.31 "belongs to John Grossbauer" as being partial return to him for the moneys paid by him, Grossbauer, for the real estate, or to plaintiffs, "in the event it is found that Grossbauer is entitled to retain title to the real estate." Petitioner denied that plaintiffs were indebted to defendant for any sum in excess of $801.93, stated that the attempted

sale of the real estate by defendant was an invalid effort to foreclose a mortgage, and on behalf of plaintiffs prayed that defendant be ordered to deposit with the clerk of the court the entire proceeds of the sale "received by him," to be held until the further order of the court. In an answer filed on January 12, 1951, by the attorney for defendant, he said that the court had no jurisdiction to enter the requested order; that defendant did not testify by deposition as stated in the petition; that the deposition had not been received in evidence or filed; that the petition seeks relief inconsistent with the pleadings of plaintiffs; that there is no provision in the Practice Act for the granting of the requested order; that there were no hearings on the issues in the case; and that to grant the prayer of the petition would be to predetermine the case before a trial.

On a hearing of plaintiff's motion before a chancellor, (Judge Peter A. Schwaba) his attorney stated that the proceeds of the sale of the property amounted to $7,868.31; that by defendant's testimony or his stipulation there was $3,600 due him and that there is no question about the fact that defendant is "holding as trust funds $4,268.31." The attorney for defendant stated that defendant had several objections to the petition. He said that the depositions were not a part of the record and denied that his client made the statements attributed to him and that he did not know of any authority for the procedure. The chancellor said that the court would put the money in escrow with the

clerk until the court decided who is entitled to it. Defendant's attorney stated that the sale took place five months previously and that defendant was not making any admission that he was holding any money for plaintiff and suggested that the petition by plaintiff's attorney be stricken. Plaintiff's attorney stated that he did not know whether defendant "is financially responsible, that at the best it is trust funds." At a further hearing on the motion and also as a part of a pretrial conference, the attorney for defendant again objected. He stated that the depositions were taken before a notary public and were no part of the evidence in the case; that the depositions when introduced would be part of the evidence and might or might not be pertinent; that the deposition "has no particular bearing at this time in determining any issues of the case"; that plaintiffs were asking for a pretrial determination; that defendant would be r quired to "put up the money which he is being sued for ahead of time"; that the petition is verified by counsel and not by plaintiffs; that "we have no basis upon which to assume any of the testimony in the deposition to be correct or incorrect until we have heard all of the testimony"; that "my answer to the petition on one paragraph alone states that the allegations in the petition are incorrect" and that it is "up to the court to hear the entire case." The chancellor stated that "the court is not listening to the whole testimony now." The attorney for defendant said "I want to hear the case. I want to hear the witnesses. I am sure the court wants to hear the witnesses, but we cannot hear it from the mouth

of the attorney." He also told the court that there is nothing in the complaint which asks for "money relief" from the defendant, and that plaintiffs in the complaint are asking "for the return of the property." The attorney for plaintiffs stated that he was going to read the deposition to the court. The chancellor said that he did not want the entire deposition read. The attorney for plaintiff said that he took the testimony of "many of the parties to the suit" and that he would "run through the pertinent parts of the testimony" which he thought would "throw light on the question of whether this is a mortgage or an outright sale to Mr. Blankenhein's nominee." He then read excerpts from the deposition starting at page 81.

After reading excerpts from the deposition the attorney for the plaintiff said: "I maintain there is no question but what that is merely a mortgage." The chancellor said that "there is enough information given the court that there is a possibility of that money drifting away" and that it could be placed on deposit with the clerk "until the adjudication is properly made." The attorney for defendant again called the chancellor's attention to the fact that plaintiffs in their complaint were asking for the return of the property. The court said that "depositing the money does not adjudicate the right of the money to anyone, or give them any right. It is just merely to safeguard it." The attorney for defendant stated that on the same basis the court could ask plaintiffs to deposit the purchase price for the property with the clerk. In answer to an inquiry

by defendant as to whether the chancellor could tell how much money defendant has, rightfully or wrongfully, the court said he did not know and that "you will have to send that matter to a master." In an altercation the attorney for defendant maintained that there was no stipulation that defendant owed plaintiffs anything and that the evidence in the deposition "is that there is not any profit." The attorney for plaintiff testified in narrative form that he asked the witness, referring to the defendant, the amount of the net proceeds that he received personally from the sale to Grossbauer and that the witness said he did not know; that after discussion it was stipulated that the attorney for defendant would ascertain the exact amount and inform the attorney for plaintiff; that later on the attorney for defendant telephoned the attorney for plaintiff and told him that the net amount that defendant received from the proceeds of the sale, including $2,000 earnest money deposited with defendant, was $7,868.31. In answer to an inquiry by the court as to why defendant should not turn "that money" over to the clerk, the attorney for defendant said "there was $3,600, plus $300, due defendant," that there were advances on the mortgage and a commission on the sale. The chancellor said he would not allow "anything on the advances of the mortgage" and that he would not allow the commission paid on the sale. The attorney for plaintiff stated the amount to be deposited "equals $3,968.31." Counsel for defendant said that he intended to file an appeal from the order. The court said: "It is not an appealable order." The attorney for defendant rejoined that it was an appealable order. On January 22, 1951, the chancellor, on the sworn petition of plaintiff's attorney, on the answer of defendant

and "statements of counsel," ordered that defendant deposit with the clerk $3,968.31 on or before January 29, 1951, to be held subject to the further order of the court. Defendant objected to the entry of the order. On January 29, 1951, defendant filed a petition praying that the order of January 19, 1951, be vacated, or in the alternative that the performance thereof be held in abeyance until the final determination of the cause. The court denied the prayer of the petition.

On January 31, 1951, plaintiffs filed a petition setting forth that defendant failed to comply with the order to deposit and asked for an attachment for contempt against defendant. The court ordered that a writ of attachment for contempt issue against defendant. On February 13, 1951, the matter of the contempt proceeding came on for hearing. The chancellor, (Judge Joseph A. Graber) on being informed that defendant was required to show cause why he should not be committed for contempt for failure to comply with the order, inquired as to why he did not comply, and defendant's attorney said: "We don't have the money to put it up"; that defendant could account for "every cent of that money" and suggested that defendant be given leave to testify "to absolve himself of the contempt" and to show that he did not have the money. The chancellor said he would assume that "he will testify he hasn't got the money. Naturally he is not going to say 'I have the money right here, but I won't turn it over.'" Defendant's attorney stated that defendant "will disclose his bank accounts and everything," that he does not have the cash to deposit, and that he ought to be permitted to testify. The chancellor said he would give him one week "to think about it." Defendant's attorney said: "He doesn't

have it today. He won't have it a week from today." The court then said: "Draw an order. He will go to jail." Defendant's attorney inquired as to whether he would be permitted to have defendant take the stand and the chancellor said: "Let the record show if he took the stand, he would testify he hasn't got the money." Defendant's attorney asked, with the chancellor's assent, to let the record further show that if defendant took the stand he would testify "he never received any such money from the sale of the property" and that "he never had any such $3,900 after deducting all expenses and costs of the sale of the property.

On February 10, 1951, pursuant to leave granted, defendant filed an amended answer to the amended complaint wherein he stated, among other things, that the purchase price realized from the sale of the real estate to Grossbauer was $32,500, which was the best price obtainable, from which was deducted the balance of the existing encumbrance amounting to $19,012.96; that after all prorations the defendant realized $12,950.64 in cash; that before defendant could realize any profit from the sale he first had to deduct the following items:

Real Estate sales commission	1625.00
Chicago Title & Trust Co. letter of opinion	57.50
Release and recording of M.B.Dunn quit claim	5.00
Mitchell T. Bernick, Attorney's fee	80.00
M. B. Dunn, Nominee's fee	100.00
Balance principal due on Articles of Agreement	4980.00
Interest to August 18, 1950 on " " "	39.84
Revenue stamps	14.85
Operating deficit on Real Estate to date of sale	1876.95
Cash to Earl A. Sanborn	801.93
Cash to Earl A. Sanborn	2400.00
Cash to Earl A. Sanborn	300.00
Deferred Management Fee	475.00
	$12756.07

that after giving effect to the amount of $12,756.07 he realized a net profit from the sale of $194.57 "without considering the expenses of advertising." On February 13, 1951, the court found that defendant wilfully failed and

refused to comply with the order to deposit and is in contempt of court because of such failure and directed that defendant be committed to the common jail of Cook County for a period not to exceed 6 months and until he shall purge himself by depositing the money with the clerk or until released by due process of law.

Defendant appeals from and prays that the order of February 13, 1951, be reversed. He maintains that the court erred in refusing to permit him to show that the money was disbursed and that he was unable to deposit the money with the clerk, in depriving him of his liberty without giving him an opportunity to prove his defense, and that the court also erred in "granting a mandatory injunction before hearing." Plaintiff states that whether or not the order of January 22, 1951, (before Judge Schwaba) was entered in error is not subject to inquiry on this appeal, and points out that defendant did not appeal from the order of January 22, 1951, and that he speaks of that order as "an injunction." He says that if treated as an injunction, an appeal would lie. At the outset we are required to determine whether on an appeal from the order of February 13, 1951, the defendant may challenge the order of January 22, 1951, on which it is based. We are of the opinion that the order of January 22, 1951 is an interlocutory order. It was not a temporary injunction. If the court or the parties considered it a temporary injunction, a bond would be required or the giving of a bond would be excused. An appeal from an order granting a temporary injunction may be taken by virtue of a special

provision of the Practice Act. The order of January 22, 1951, did not determine any issue. It directed defendant to deposit a certain amount of money, subject to the further order of the court. The court retained jurisdiction to enter a decree making final disposition of the amount so deposited. A decree is "final" within the meaning of §77 of the Civil Practice Act if it finally disposes of the rights of the parties either upon the entire controversy or upon some definite and separate branch thereof. Altschuler v. Altschuler, 399 Ill. 559; Brauer Machine & Supply Co. v. Parkhill Truck Co., 383 Ill. 569; Sebree v. Sebree, 293 Ill. 228; Moore v. Moyle, 405 Ill. 555; and Roddy v. Armitage-Hanlin Corp., 401 Ill. 605. Under the Civil Practice Act an appeal from a final judgment, order or decree reviews any erroneous action of the trial court if the point is properly preserved. See Bride v. Stormer, 368 Ill. 524, 527; and Feldman v. Illinois State Pawners Assn., 279 Ill. App. 476, 480. We are satisfied that the order of January 22,1951, was not a final order and was not appealable, and that defendant has a right to attack that order on his appeal from the commitment order of February 13, 1951. We are of the opinion that defendant is mistaken when he speaks of the order of January 22, 1951, as a mandatory injunction, and that he was also mistaken when on oral argument he stated that the order of January 22, 1951, was a final appealable order.

From a recital of the pleadings and proceedings it is apparent that the issue was joined on several factual allegations. If either party believed that the pleadings

presented only questions of law, then it was the duty of such party to raise such questions on a motion to strike or on a motion for a decree based on the admissions of the pleadings. The respective parties and the chancellor believed that the issues were to be determined after a full hearing. Defendant maintained in his pleadings and by his attorney at the hearing that he did not owe the plaintiff any money. Sec. 57 of the Practice Act and the rules implementing it provide for summary proceedings to obtain judgments and decrees, but plaintiff was not proceeding under that section. In Dunham v. Kauffman, 385 Ill. 79, the court said: "In earlier cases in Illinois, it was held that there is no such thing as equitable attachment. (Phelps v. Foster, 18 Ill. 309; Shufeldt v. Boehm, 96 Ill. 560.) The later changes in the Attachment Act do not change that rule." In the instant case defendant denied that he was holding any of those funds. The effect of the order was to prejudge the case to the detriment of defendant. It will be recalled that defendant was willing to introduce testimony to support the allegations of his answer. We find that the court erred in entering the order of January 22, 1951. The second chancellor, in committing the defendant, relied entirely on the order of January 22, 1951. He did not permit the defendant to show, as he said he could, that he did not have any funds of the plaintiff. For the reasons stated the order of February 13, 1951, is reversed.

ORDER REVERSED.

FRIEND, J., and NIEMEYER, J., Concur.

45529

ESSANESS THEATRES CORPORATION, a Delaware corporation, and EDWIN SILVERMAN,	)	
Plaintiffs-Appellants,	)	346 I.A. 214
v.	)	
	)	APPEAL FROM
THE NORTHERN TRUST COMPANY, an Illinois corporation, KATHRYN P. LE ROY and MORRIS GLASSER, individually and as executors of and trustees under the will of Sidney M. Spiegel, Jr., deceased, and EMIL STERN,	)	CIRCUIT COURT
	)	COOK COUNTY
Defendants-Appellees.	)	

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On October 31, 1950, Essaness Theatres Corporation, a Delaware corporation, and Edwin Silverman filed a complaint in chancery in the Circuit Court of Cook County against The Northern Trust Company, Kathryn P. Le Roy and Morris Glasser, individually and as executors of and trustees under the will of Sidney M. Spiegel, Jr., deceased, and Emil Stern. Plaintiffs ask that defendants be decreed to pay the corporation $625,900. On motion of some of the defendants the court struck the complaint. Plaintiffs, pursuant to order, filed an amended complaint. On motion of plaintiffs, Edwin Silverman was permitted to withdraw as a party plaintiff. The amended complaint, on behalf of the corporation, alleges that it was organized as a corporation under the laws of Delaware in 1930 and licensed to do business in Illinois, with its principal place of business in Chicago; that Morris Glasser, The Northern Trust Company and Kathryn P. Le Roy are executors of the estate of Sidney M. Spiegel, Jr., deceased, by virtue of letters issued by the Probate Court of Cook

County; that they are also the duly constituted trustees under his will; that Kathryn P. Le Roy was the wife of Sidney M. Spiegel, Jr., until his death on October 19, 1944; that Morris Glasser of the firm of Altschuler, Melvoin and Glasser, certified public accountants, was the auditor for plaintiff from 1930 to December 31, 1949; that Glasser was a director of plaintiff corporation from October 30, 1944, to December 17, 1945, having been elected in place of Spiegel; that Stern was a director, vice president and stockholder of the corporation from 1930 until December 17, 1945; that in 1935 plaintiff's charter was amended so that there was issued to Silverman 375 shares of Class A stock, to Spiegel 375 shares of Class B stock and to Stern 250 shares of Class C stock, a total of 1,000 shares being issued; that no other stock was issued thereafter; that each class had the right to elect one director; that "otherwise all of the stockholders had the same rights"; that plaintiff was the sole stockholder of 10 named subsidiary corporations; and that it had less than all of the stock in 3 other subsidiary corporations.

Paragraph 10 sets out plaintiff's by-laws and Paragraph 11 the by-laws of its subsidiaries. Paragraph 12 alleges that until October 19, 1944, the date of Spiegel's death, Silverman, Spiegel and Stern were the sole stockholders and directors of plaintiff and were president, vice president and secretary-treasurer, respectively. Plaintiff alleges that under an agreement it carried life insurance on the lives of Silverman, Spiegel and Stern, which provided that upon the death of any one of them it was required to use the proceeds of the insurance to retire whatever stock

could be purchased at a price agreed upon; that upon Spiegel's death, plaintiff, on November 17, 1944, used $211,789.26, being the proceeds of the insurance carried on his life, to retire 84.7157 shares of plaintiff's stock owned by the estate of Spiegel; that voting of their stock was by unanimous vote of all of plaintiff's directors; that Stern, owning 250 shares and the Spiegel estate owning 290 plus shares of stock owned a majority of plaintiff's stock and therefore they owed to plaintiff a fiduciary duty which required Stern and the executors to be honest and fair in their personal dealings with plaintiff and not to benefit themselves at its expense; that as a result of the deadlock, Stern, Glasser and the other executors of the estate conspired to cause Silverman to consent to plaintiff's purchasing, at excessive prices, the stock of plaintiff owned by Stern and the executors; that "this conspiracy" was followed by threats to Silverman by Stern and Glasser to the effect that they would have a receiver appointed to take charge of the affairs of plaintiff and its subsidiaries unless Silverman consented to purchase their stock in plaintiff at excessive prices; that as a result of the conspiracy and threats Silverman consented to purchase the stock owned by Stern and the executors; that contracts for the sale of the stock by Stern and the executors, as sellers, and plaintiff as purchaser, were entered into on or about November 1, 1945; that on December 17, 1945, the executors received $540,000; that Kathryn Le Roy received $34,900 in payment for their stock; and that Stern received $583,000 for his stock and other considerations, all of which payments were at least $625,000 in excess of the value of the shares of stock.

Paragraph 13 of the amended complaint alleges that on or about April 1, 1944, Spiegel, Stern and Glasser entered into a conspiracy and scheme to maliciously defraud plaintiff and, by threats of illegal actions harmful to plaintiff, to force Silverman to consent to plaintiff's purchase of the stock owned by Spiegel and Stern at a price greatly in excess of its fair market value and greatly in excess of the cash in possession of plaintiff; that otherwise Spiegel and Stern would cause plaintiff and its subsidiaries to declare large dividends, thereby greatly injuring plaintiff's cash position; and that although all acts, including the declaration of dividends, had previously been approved by unanimous vote of all directors, the conspirators confederated to declare the dividends by vote of Spiegel and Stern as a majority in violation of the requirement of unanimous director action and in violation of the by-laws. Paragraph 14 avers that in furtherance of the conspiracy and in violation of their fiduciary duties, Spiegel, Stern and Glasser, about April 1, 1944, demanded that plaintiff declare a dividend of $175,000 or buy the stock of Spiegel and Stern at prices greatly in excess of the fair market value; that in consequence of the conspiracy and duress, Silverman agreed to cause plaintiff to buy Stern's 250 shares for $625,000; that Spiegel refused to consent to the purchase; that thereupon Silverman offered to cause plaintiff to buy Spiegel's 375 shares for $937,000; that Stern refused to consent to such purchase; that both Spiegel and Stern refused to consent to plaintiff's purchase of Silverman's 375 shares at a price of $937,000; and that in each case the price was based on the July 1, 1944, agreement. Paragraph 15 alleges that in furtherance of the conspiracy,

on August 16, 1944, Spiegel, as secretary of the corporations, gave notice of special meetings of their boards of directors to be held on August 22, 23 or 27, 1944, for the purpose of declaring dividends; that while pressing the immediate threat of declaring dividends totaling $175,000 at the meetings by majority vote of the directors, in violation of the agreement and by-laws, Spiegel and Stern renewed their demands for the purchase of their stock for the price of $1,562,000; and that before the conspirators could complete their acts of coercion and duress, Spiegel died on October 19, 1944.

In Paragraph 16 it is alleged that by reason of the conspiracy alleged in Paragraph 13, Spiegel and Stern owned and controlled a majority of the stock of plaintiff and as directors, officers and owners of the majority of stock Spiegel and Stern owed fiduciary duties to plaintiff which required them to exercise the highest degree of fairness in their personal dealings with it and not to abuse the privileges so held in order to benefit themselves at plaintiff's expense. Paragraph 18 refers to the executors' initial offer required under the July 1, 1940 agreement (to sell the remaining shares at $2,500 per share) and to plaintiff's rejection thereof because Stern refused to permit plaintiff to make the purchase unless it also bought his stock. Paragraph 19 alleges that on October 20, 1944, the executors, voting the Class B stock, elected Glasser a director of plaintiff to fill the vacancy caused by the death of Spiegel. Paragraph 21 alleges that as a consequence of the conspiracy, threats and duress, plaintiff was forced to purchase the executors' and Stern's stock at a price far in excess of the fair market

value thereof. Paragraph 22 avers that on April 9, 1945, in furtherance of the conspiracy, Stern agreed to sell his 250 shares to plaintiff pursuant to a contract; that on April 9, 1945, plaintiff was forced to make an offer to the executors for their stock, which offer was not accepted because of possible income tax liability; that on or about October 20, 1945, as a result of the conspiracy and duress, plaintiff made an offer to purchase the executors' stock; that the offer was accepted on November 1, 1945; that a condition of acceptance imposed by the executors was that $34,900 be paid to Kathryn Le Roy; and that on October 20, 1945, in furtherance of the conspiracy, Stern made an agreement with plaintiff to revive the agreement of April 9, 1945. Paragraph 23 charges that on December 17, 1945, as a result of the conspiracy and duress, plaintiff was forced to consummate the contracts; that subsequent to October 19, 1945, Kathryn Le Roy and The Northern Trust Company aided and abetted Glasser and Stern in carrying out the conspiracy and duress.

Defendants, Morris Glasser and The Northern Trust Company, were served with summons by the Sheriff of Cook County. Emil Stern and Kathryn Le Roy were served with the summons and complaint by delivering to each of them in California a true copy of the summons and complaint. Special appearances and motions were made to quash the service of summons upon these defendants. Stern filed an affidavit saying he was a resident of Illinois, but was in California temporarily and would return to Chicago. Kathryn Le Roy did not say that she was a resident of Illinois. She is still acting as one of the executors of the Spiegel estate under the jurisdiction of the Probate Court of Cook County. The chancellor

allowed the motion to quash the summons served in California upon these defendants. The Northern Trust Company and Morris Glasser, individually and as executors of and trustees under the will of Sidney M. Spiegel, Jr., deceased, filed a motion to strike and dismiss upon the ground that no cause of action was stated. The court struck the amended complaint and dismissed the cause as to all parties for want of equity. Plaintiff applied for leave to file a second amended complaint, supporting its motion with affidavits of new matter to be incorporated therein, recently discovered. Upon consideration of the new matter the chancellor denied the motion and again dismissed the complaint with costs, remarking that the new matter would not cure the alleged defects in substance in the amended complaint. Plaintiff, appealing, prays that the decree be reversed and that the cause be remanded with directions that defendants answer.

Plaintiff in its brief summarizes the facts alleged in the amended complaint by saying that its three directors, by power of their position as corporate officers, caused it to purchase certain shares of its stock from defendants at an inflated price of $625,000 in excess of the real value of the stock, all of whom at the time knew of such inflated valuation. The first point urged by plaintiff is that as officers, directors and owners of a majority of the stock, defendants owed a fiduciary duty to be honest and fair in dealing personally with it, and that they breached that duty by selling their stock to it for a sum of $625,000 in excess of its value; that plaintiff alleges that Stern and Glasser were directors; that Stern was vice president; that Stern, Glasser and the other executors owned a majority of the stock;

that defendants designedly and knowingly sold their stock to plaintiff for $625,000 in excess of its true value thereby taking that amount from the corporate treasury without consideration; that there was a breach of fiduciary relationship by which defendants unjustly enriched themselves at the expense of plaintiff; and that if no other facts were alleged, such allegations set forth a good cause of action, citing Winger v. Chicago City Bank & Trust Co., 394 Ill. 94; Dixmoor Gulf Club v. Evans, 325 Ill. 612; and Lebold v. Inland Steel Co., 125 F.2d. 369. Plaintiff also states that as defendants, by virtue of their power over the corporate funds caused plaintiff to purchase their own stock at prices in excess of reasonable value, an accounting lies to recover back the excess in value so paid as money had and received for the benefit of plaintiff.

We are of the opinion that plaintiff has not alleged ultimate facts making out a case of self-dealing with it by the defendants. The cases cited by plaintiff are not applicable to the allegations. The Winger case held that the management group of an insurance company could not divert the assets to themselves at the expense of the policyholders, who were harmed by the management's secret diversion of the corporate funds. No such charge has been made in the instant case. Silverman, Stern and Spiegel owned all of the stock of plaintiff. The shares owned by defendants were purchased by plaintiff pursuant to the unanimous action of all its directors and shareholders, including Silverman. These circumstances differentiate plaintiff's case from that of the policyholders in the Winger case. In the Dixmoor case the directors of the corporation made secret profits by selling land to it for more

than the directors had paid for it. The court held that the directors should be compelled to disgorge their secret profits. In the case at bar there was no secrecy about plaintiff's purchase of defendants' shares. The purchase was made at the direction of all the shareholders and directors. The amended complaint charged that Silverman was forced by duress, coercion and intimidation to consent to the purchase. Such duress could not have been secret or it would have been nonexistent. In the Lebold case the minority stockholders sued to recover damages claimed to have been incurred by reason of the alleged fraudulent acts of the steel company in dissolving the steamship company, buying its assets and appropriating its business. The theory of the plaintiffs was that the steel company owning approximately 80% of the stock of the steamship company had so utilized its dominant position as majority stockholder as to force the latter out of a prosperous business, bring about its dissolution and take over its property and business to the detriment of plaintiffs. Plaintiffs therein sought damages, based on duress, being the difference in value of their prorata share in the ore boats and their share in a prosperous concern. The District Court dismissed the suit. On appeal the Circuit Court of Appeals found that the directors and majority stockholders dealt with the assets of the corporation for their own benefit, and held that defendants must account to the corporation and its minority stockholders the same as a trustee would account to beneficiaries. Applying the Lebold case to the facts of the instant case, plaintiff says that since defendants as directors and owners of the majority stock of plaintiff dealt with plaintiff's assets for their own benefit, that defendants should be required to answer and account for their

ill-gotten gains like any other trustee would answer to his beneficiaries. The factual situations in the Lebold case and the case at bar are not analogous. What Inland did in that case was over the objections of the minority shareholders. Plaintiff's purchase of defendants' stock was in pursuance of the action of all the shareholders and directors. Plaintiff in the instant case is not a minority stockholder.

Plaintiff argues that the threat by defendants that unless their shares of stock were purchased by it they would have a receiver appointed for it and its subsidiary corporations, constituted duress, and points out the allegations that defendants, by taking advantage of a deadlock of the boards of plaintiff and its subsidiaries, entered into a conspiracy to have a receiver appointed unless defendants' shares were purchased by plaintiff at prices greatly in excess of the value. Plaintiff asserts that had defendants threatened to institute legal proceedings to have a receiver appointed without coupling such threat with a demand that plaintiff purchase their stock, defendants would have been within their rights, but what made their threat illegal was tying the threat with a demand that their stock be purchased by taking $625,000 out of the corporate till. In support of its argument plaintiff cites Slade v. Slade, 310 Ill. App. 77; Chicago & Alton R.R. Co. v. Chicago, Vermilion & Wilmington Coal Co., 79 Ill. 121; Pemberton v. Williams, 87 Ill. 15; and Pittsburg Steel Co. v. Hollingshead & Blei, 202 Ill. App. 177. An analysis of the amended complaint convinces us that plaintiff does not make out a case of duress.

The first charge is that Spiegel, Stern and Glasser threatened to have plaintiff and its subsidiaries declare dividends, contrary to their respective by-laws. The second charge is that Stern and Glasser threatened to use the alleged deadlock of the boards of directors as a basis for filing a petition for the appointment of a receiver. It is well settled in this State that duress to be actionable must deprive the victim of the free exercise of his will. See Prontzinski v. Baker, 364 Ill. 451; Stoltze v. Stoltze, 393 Ill. 433; Shlensky v. Shlensky, 369 Ill. 179; Burandt v. Burandt, 318 Ill. 218; and Gregory v. Gregory, 323 Ill. 380. The amended complaint does not show that Silverman was deprived of his faculties by the threats and does not make out a case of duress.

Plaintiff admits that defendants had a right to apply for the appointment of a receiver and to sell their stock to it. Silverman, as a businessman, knew that the appointment of a receiver would have damaged defendants as greatly as it would him, and that as executors and trustees it was their duty to protect and preserve the property of the estate, including its shares in plaintiff corporation. If the threat of Stern and Glasser to apply for the appointment of a receiver had been carried out, Silverman could have resisted and thwarted the attempt if there was no legal ground therefor. In Mills v. Forest Preserve District, 345 Ill. 503, the court said (511) that it is not coercion or duress "for a person who is making a claim against another who disputes it, to threaten to bring suit in a court of competent jurisdiction against that other and to use every effort to procure a judgment

to the full extent of his claim." See also Stone's Beauty Shops, Inc. v. Morrison Service Ass'n., 285 Ill. App. 163, 168. In 17 Am. Jur., p. 892, Duress and Undue Influence, the author says:

> "It is the well-established general rule that it is not duress to institute civil suits, or take proceedings in court, or for any person to declare that he intends to use the courts wherein to insist upon what he believes to be his legal rights. It is never duress to threaten to do that which a party has a legal right to do, and the fact that a threat was made of a resort to legal proceedings to collect a claim which was at least valid in part constitutes neither duress nor fraud such as will avoid liability on a compromise agreement."

We agree with defendants that threatening to declare dividends even though the alleged duress continued over a period of months, and threatening to apply for the appointment of a receiver, were not sufficient to deprive Silverman of his ability to exercise his free will or to make plaintiff's payment involuntary. We have read the cases cited by plaintiff and are of the opinion that they are not applicable to the factual situation presented by its allegations.

It is interesting to note that notwithstanding the open, notorious and adverse acts charged against Glasser that he was a member of the accounting firm continuously employed by plaintiff as its auditors and financial advisors from 1930 until December 31, 1949. The fact that Glasser was retained as auditor and financial adviser of plaintiff until December 30, 1949, indicates that there was no duress or coercion. Plaintiff alleges that it was forced to buy the 290.2843 shares of its stock from the Spiegel estate for $540,000, or about $1,860 per share, and that it bought Stern's 250 shares for $583,000, or $2,332 per share. The allegations show

that the executors made an initial offer to sell their shares to plaintiff for a price of $2,500 per share, which was refused by plaintiff because Stern refused to permit it to make the purchase unless it purchased the stock owned by him at the same time on the same basis and for other considerations. It appears therefore that Silverman would have caused plaintiff to buy the Spiegel shares for $2,500 per share but for Stern's refusal to consent. This allegation negatives any conspiracy between Stern and the Spiegel estate. One of the principal threats allegedly made was to have plaintiff declare a dividend of $175,000. Paragraph 13 of the amended complaint alleges that at the time of the threat plaintiff and its subsidiaries needed cash for postwar rehabilitation and for preparation to meet the competitive threat of television. It is not logical to argue that to avoid paying out $175,000 of much-needed cash, it agreed to and did expend $1,123,000 to acquire the stock from the Spiegel estate and Stern. Despite the fact that there was an "immediate threat" to declare dividends of $175,000, no action was taken at the subsequent directors' meetings, nothing had happened when Spiegel died and no dividends had been declared when the purchases were consummated in December of the following year. Moreover, the declaration of dividends required unanimous action. If it did not require unanimous action then threatening to do so would not show that Spiegel, Stern and Glasser did anything improper in urging the declaration of such dividends. It appears from Paragraph 14 that Silverman tried to sell his 375 shares to plaintiff for $2,500 a share. It is difficult to understand

how the purchase of the Spiegel stock at $1,860 a share could be the result of a conspiracy or duress on the part of Spiegel, Stern, Glasser or the executors or trustees.

In Heaps v. Dunham, 95 Ill. 583, our Supreme Court said (586) that a conspiracy "may be regarded a combination of two persons or more, by a concerted action, to accomplish a criminal or unlawful purpose, or a purpose not in itself criminal, by unlawful or criminal means." The amended complaint is replete with conclusions. A mere averment that an act was done with a certain purpose or intent, without a statement of the facts showing such purpose or intent, is a conclusion of law. The charges of threats, coercion, intimidation and duress against Spiegel and defendants are conclusions. The amended complaint shows that the deadlock complained of was attributable to agreements freely entered into among all the stockholders and to the by-laws adopted by plaintiff and its subsidiaries.

Plaintiff insists that the court erred in denying its motion for leave to file a second amended complaint. The court stated that plaintiff could file a written motion for leave to file a second amended complaint, which motion could set up new matter "or different matter of substance" it intended to incorporate in such amended complaint. Conforming to the suggestion of the court, plaintiff made such a motion and set out new written evidence which first came to its attention on February 21, 1951. It is our view that the proposed second amended complaint would not cure the defects of substance in the amended complaint. In our

opinion the chancellor did not abuse his discretion in refusing to allow the filing of the second amended complaint. See Foss v. People's Gas Light & Coke Co., 241 Ill. 238; Dean v. Kirkland, 301 Ill. App. 495, and Skenk v. Continental Illinois National Bank & Trust Co., 334 Ill. App. 373.

Finally, plaintiff asserts that service upon Emil Stern and Kathryn Le Roy, citizens of Illinois temporarily absent from the state, with a copy of the summons and complaint in California, was good and valid under Sec. 16 of the Civil Practice Act (Par. 110, Ch. 110, Ill. Rev. Stat., 1951). The parties are in agreement that the Supreme Court of the United States has held that a state may authorize the service of summons in another state upon one of its citizens who is temporarily out of the state for the purposes of an in personam action. See Milliken v. Meyer, 311 U.S. 457, wherein the court said that "domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for the purposes of a personal judgment by means of appropriate substituted service," that substituted service in such cases "has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state [citing cases] as well as where he was personally served without the state," and that as in the case of the authority of the United States over its absent citizens "the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state." The question we are asked to answer is whether Illinois has by appropriate legislation provided

for out-of-state process upon its citizens temporarily beyond its borders so as to give the courts jurisdiction to enter judgments in personam against parties so served. The Wyoming statute discussed in the Milliken case authorizes either publication or personal service outside of the state in any action where the defendant, being a resident of the state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keep himself concealed with like intent. Plaintiff states that Sec. 16 (Par. 140) authorizes the service in the case at bar. That section provides that personal service of summons and copy of the complaint outside of this state may be made by any person over 21 years of age not a party to the action "and shall have the same force and effect as service by publication." Service by publication is permitted by Sec. 14 (Par. 138) when the defendant has gone out of the state in any civil action affecting property or status within the jurisdiction of the court, including an action to obtain the specific performance, reformation or rescission of a contract for the conveyance of land, or in any action at law to revive a judgment or decree. McCaskill, in his Illinois Civil Practice Act, Annotated, 1936 Ed., p.34, states that Sec. 14 is a combination of Sec. 12 of the old chancery act and Sec. 43 of the practice act of 1907, and that personal judgments and decrees cannot be obtained against nonresidents of a state upon service by publication. Plaintiff places great reliance on Nelson v. C.B. & Q. R.R. Co., 225 Ill. 197, a suit against a resident railroad corporation served by publication within the state pursuant to Sec. 5 of the then

104.014

practice act. Illinois has long had and now has legislation permitting such service on corporations, unlimited as to type of action. See Sec. 17 (Par. 141, Ill. Rev. Stat. 1951), which is derived from Sec. 8 of the practice act of 1907 and in turn from Sec. 5 of the practice act of 1872. No similar legislation exists with respect to individuals. Sec. 13 of the practice act (Par. 137, Ch. 110, Ill. Rev. Stat. 1951) requires personal or resident service upon an individual defendant in any civil action "except as otherwise expressly provided herein," the express exceptions obviously being Secs. 14 and 16.

In holding invalid for want of jurisdiction a money decree against a resident of Illinois served by publication, this court, in Fitzgerald v. First National Bank of Chicago, 272 Ill. App. 570, distinguished the case from the corporate service upheld in Nelson v. C.B. & Q. R.R. Co., supra, saying that the Supreme Court has held in substance that it was the intention of the legislature to provide that a personal judgment could be obtained against a railroad company in this manner, but that as to individuals it was not the intention of the legislature to authorize personal judgments upon process which consists merely of notice by publication and mailing. We are of the opinion that Secs. 14 and 16 of the practice act, being in pari materia, must be considered together, giving full effect to the language of each. These two sections complement each other. Personal service outside the state is an alternative form of constructive service only where service by publication would be valid. It is our view that the service of a summons

and a copy of the complaint on a defendant outside the state has the same force and effect as service by publication. We are satisfied that in ruling on that proposition the chancellor correctly construed Secs. 14 and 16 of the practice act.

For the reasons stated the decree of the Circuit Court of Cook County is affirmed.

DECREE AFFIRMED

FRIEND, J., and
NIEMEYER, J., Concur

45693

A

143

NATIONAL WIRED MUSIC CORP., a corporation, Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
434 CERMAK BUILDING CORP., a corporation, Appellee.	)	OF CHICAGO

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On September 15, 1950, National Wired Music Corp., a corporation, filed a statement of claim in the Municipal Court of Chicago against 434 Cermak Building Corp., a corporation, for work and labor performed and material furnished at the special instance and request of the defendant on which the latter owed a balance of $203.40, for which plaintiff asked judgment. Summons was issued and served on the defendant, which entered its appearance on September 26, 1950. On September 28, 1950, defendant filed a "Defence." On May 3, 1951, the attorneys for defendant, having given due notice to it and pursuant to the order of court, were given leave to withdraw as attorneys for defendant. On June 20, 1951, the cause coming on for trial without a jury, the court entered judgment against defendant for $218.40. On August 9, 1951, an attorney representing defendant filed a notice of motion, supported by an affidavit, to vacate the judgment, to permit him to appear and defend "as attorney for the defendant" and for an involuntary dismissal of the action. The motion was continued to August 10, 1951, at which time the court entered an order vacating the judgment. The record shows that plaintiff opposed defendant's motion

and objected to the action of the court in vacating the judgment. Plaintiff appeals. Defendant has not appeared in this court.

After the expiration of 30 days from the entry of the judgment ~~of~~ the Municipal Court of Chicago had no power to vacate the judgment except upon a petition setting forth grounds which would be sufficient to cause the judgment to be vacated by a bill in equity, or by a motion in writing to correct errors of fact which by the common law could have been corrected by a writ of error coram nobis. Defendant did not attempt to make any showing of diligence. The only basis on which the court acted in allowing defendant's motion was that there was a variance between the name of plaintiff as shown in its statement of claim and judgment and its name in the records of the Secretary of State. It was contended that the true name of plaintiff is "National Wired Music Corporation of Illinois." This is substantially the same as shown in the statement of claim and judgment. Defendant did not make any such claim in its "defence." It knew or should have known the name of plaintiff at the time it filed its appearance and "defence" and at the time the judgment was entered against it. See Hickman v. Ritchey Coal Co., 252 Ill. App. 560; Chapman v. American Life Ins. Co., 212 Ill. App. 389, affirmed 292 Ill. 179; Trust Co. of Chicago v. Public Service Co., 324 Ill. App. 228. The Court had no power to vacate the judgment. Therefore, the order of the Municipal Court of Chicago entered on August 10, 1951, is reversed and the cause is remanded with directions to restore the judgment.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, J., and NIEMEYER, J., Concur.

A

45514

PIPE TRADES, INC., a corporation, Appellant,	APPEAL FROM
v.	MUNICIPAL COURT
GEORGE LEMON and HARRY MICHAEL, d/b/a MICHAEL TILING & IMPROVEMENT CO., Appellees.	OF CHICAGO

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On April 20, 1948 Pipe Trades, Inc., a corporation, filed a statement of claim in the Municipal Court of Chicago for mechanics' lien against real estate alleged to be owned by George Lemon who was the only defendant named. It alleged that Lemon had entered into a contract with plaintiff to make certain improvements on the property described in the complaint consisting of plumbing and steam fitting; that the last work performed by plaintiff upon the premises was done on September 30, 1946; that on January 23, 1947 it caused to be served on the owner and defendant (Lemon) a notice of mechanics' lien in accordance with the statute; that there remained due and unpaid to plaintiff from defendant, after allowing all credits, the sum of $295.93, together with interest; and plaintiff asked for judgment in that sum and a mechanics' lien against the property described "in accordance with the Statute in such case made and provided." Defendant's answer denied any such contract with or indebtedness to plaintiff. When the cause came on for hearing November 17, 1948 before Judge Hackett of the Municipal Court, plaintiff offered in evidence a

contract with Michael Tiling to which Lemon was in no wise a party; also a notice of mechanics' lien showing that plaintiff was a subcontractor of Michael Tiling and Improvement Company. Defendant thereupon made a motion to dismiss the statement of claim because of plaintiff's failure to make Michael Tiling and Improvement Company a party defendant, as required by section 28 of the Mechanics' Lien Act (Ill. Rev. Stat. 1951, vol. 2, ch 82). At the same time plaintiff obtained leave and filed an amended statement of claim on December 9, 1948, joining the individuals Lemon and Tiling, and Michael Tiling and Improvement Company as defendants. It appeared from the amended statement of claim that it was filed more than two years immediately following the completion of the work, and accordingly, on January 20, 1949, Lemon moved to strike the amended statement of claim for the reason that it was not filed within the two-year period required by section 9 of the Mechanics' Lien Act, as well as for other reasons. While the motion to strike was pending and undisposed of, plaintiff made a motion for summary judgment. Both motions were set for hearing before Judge Green of the Municipal Court on November 3, 1950. Since defendant's motion challenged the jurisdiction of the court it was heard first, and the court found that the amended statement of claim set forth a new cause of action and that it was not filed within two years after completion of the work; therefore an order was entered dismissing the amended statement of claim. It appears that plaintiff in the same suit made a claim for $17.18 for the purchase of one reverter valve. Lemon admitted owing that amount, consented to the entry of judgment and subsequently

paid the judgment by depositing that sum with the clerk of the Municipal Court for plaintiff's use. There was no hearing on plaintiff's motion for summary judgment. Plaintiff appeals from the order striking his amended statement and dismissing the suit. On November 26, 1951, while the cause was pending on appeal, J. Lawrence Holleran suggested the death of George Lemon, and an order was entered that he (Holleran) as administrator, be substituted as party defendant for Lemon.

The controlling question is whether the amended statement of claim states a new cause of action. The authorities are in accord in holding that introducing by amendment an essential element of the cause which was originally omitted is considered a new cause of action. North Side Sash and Door Company v. Hecht et al., 295 Ill. 515, contains a full discussion of the subject. See also Fifty-ninth St. Lumber Company v. Emery, 237 Ill. App. 416, wherein the court followed the Hecht case and said that "the notice as filed being insufficient, and the amendment to the bill having been filed more than four months after the alleged date of the last delivery of materials under the contract, the lien could not be enforced ***." The original statement of claim was clearly defective; under it plaintiff would not have been entitled to a mechanics' lien within the provisions of the Mechanics' Lien Act. It follows that the amended statement of claim stated the only cause of action in compliance with the statute; and since it was filed more than two years immediately following the

completion of the work there was no compliance with the Liens Act, and the court properly struck the complaint and dismissed the suit.

In the view taken it is unnecessary to discuss other questions raised. The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J. and NIEMEYER, J., Concur.

A

147

45523

ALICE FERGUS, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT
DeWITT HOTEL, INC., a corporation, Appellant.	)	COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff Alice Fergus, who resided with her sister in a furnished apartment at the DeWitt Hotel, operated by defendant and located at 244 East Pearson street in Chicago, was burned while lighting a gas range in her apartment about three o'clock in the morning on November 22, 1949. Her suit for damages resulted in a verdict and judgment against defendant for $10,000, from which defendant appeals. In the course of the trial defendant had made motions for a directed verdict at the close of plaintiff's evidence and again at the conclusion of all the evidence, both of which were denied, as was its motion for judgment notwithstanding the verdict; there was no motion for a new trial.

It is defendant's sole contention that plaintiff failed to prove any negligence on the part of defendant which was the proximate cause of plaintiff's injuries or that she was in the exercise of due care for her own safety, and that the court should therefore have directed a verdict for defendant or entered judgment notwithstanding the verdict.

There is substantially no dispute as to the salient facts. The apartment in which plaintiff and her sister lived consisted of a living room with Pullman kitchen, bedroom and bath. The furnishings were provided by defendant; among the facilities was a gas range with four top burners and an

oven. The burners were lighted by a pilot light centrally located. The ranges in the hotel were maintained in part by the Consumers Company, and the head janitor of the hotel, Henry Krabbe, made adjustments on the ranges whenever so requested by the tenants. Plaintiff and her sister had regularly used the range in question when preparing their meals.

The only direct evidence concerning the accident was given by plaintiff herself. She had retired early in the evening but, being unable to sleep, got up about three or three-thirty in the morning to heat some milk. After placing a pan on a back burner of the range, she turned on the gas but the burner did not light immediately. She then stooped over to see if the pilot light was burning, and as she did so the gas ignited, flaring up in her face and setting her nightgown on fire. Plaintiff was uncertain as to the interval of time that elapsed between turning on the burner and the actual ignition, but she estimated it to be about one minute.

The negligence charged in the complaint is general. Plaintiff alleged that defendant, "not regarding its duty, failed and neglected to keep and maintain its cooking gas and equipment in said hotel, provided by it for the use of its guests, and plaintiff in particular, in a reasonably safe condition and state of repair." In describing the manner in which the gas ignited at the time of her injury plaintiff characterized it as "just like an explosion," but she also stated that no damage resulted to the range

or the room, and that on previous occasions when the gas was turned on it would flare up the same way when it ignited. Her sister stated that if the pilot light was correctly adjusted it was not at all unusual to have the flame flare up when it went on; "that is the way it works; that is the way it always lighted." Before this occasion plaintiff had never had any trouble with delayed ignition. The only prior trouble with the range was that the pilot light would go out occasionally; this had happened approximately a week or ten days before the accident. Plaintiff at that time had called the office of the hotel and asked that someone come up to adjust it. In response to the call Henry Krabbe repaired the light, and it continued in good order up to the time of the accident. Plaintiff's sister stated that she had had no trouble with the range between the time it was repaired and the time the accident occurred.

Krabbe testified that about a week or more before the occurrence in question he received a complaint from plaintiff concerning the range. Upon going to her apartment he found that the pilot light was out. He first raised the top of the range and tested the burners; next he turned the control valve of the pilot light with a screw driver, raised it up a bit and tightened the lock on it. He then tested the burners and found that they worked satisfactorily. He also stated that before this adjustment he never had had any occasion to be in plaintiff's apartment to make similar repairs; that after he learned of plaintiff's accident he went to her apartment to examine the range, turned on the burners and found them to be in perfect condition. Plaintiff's

sister continued to use the range without further adjustment until some time after plaintiff returned from the hospital; it worked satisfactorily. Plaintiff said that on previous occasions when the pilot light had gone out she or her sister would lift the porcelain cover over the four burners to look at the pilot, but on this particular occasion she did not do so; instead she stooped over the range to look at the burner; that it lit when she stooped over it, and the delayed ignition caused her nightgown to catch fire.

It is plaintiff's contention that the delayed ignition resulted from a defective adjustment of the pilot light. Joseph F. Phillips, an expert, gave it as his opinion that if a space of one minute intervened between the time a burner was turned on and the time it ignited, and there was then a flare up, it was evidence of an abnormal or defective condition; that a burner of this type should ignite in a matter of seconds; and that a one-minute ignition delay could be caused by the amount of gas supplied to the pilot--if the pilot flame were too low, a gas mixture would build up and passing a hand over the ignition tube or any disturbance of the air so as to force an excessive amount of gas down the ignition tube would cause it to flare back. He described the mechanism of the pilot and stated that if it were moved off center the gas would not come directly into the pilot light; and he added that dirt over the hole in the pilot or any grease in the pilot light proper would cause a delayed ignition or no ignition at all.

Of all the possible causes of delayed ignition suggested by Phillips, the one which was completely eliminated from the case by the testimony of plaintiff and her witnesses

was that it could have been caused by an improperly adjusted pilot light; and there is the attempted implication on the part of plaintiff, without any evidence to support it, that Krabbe a week or ten days before the accident had adjusted the pilot improperly. The fact is undisputed that the pilot worked satisfactorily up to the time of the accident and immediately thereafter for a considerable period of time, clearly refuting the implication of improper adjustment. Phillips had testified that if the pilot light were properly adjusted and locked it could not change; once locked in position, it would remain constant; if it were improperly adjusted, with the flame either too high or too low, and then locked, it would remain improperly adjusted until the next time it was set; on the other hand, if it were properly adjusted and then locked, it would remain in proper adjustment; and if the pilot light is locked it cannot work properly one time and improperly the next.

A hypothetical question propounded to Phillips failed to include the fact that the pilot light had worked perfectly for a week or more before the accident and immediately thereafter. In the view we take, the impropriety of the question as put need not be discussed further; nor is it important to consider the contention that plaintiff was contributorily negligent, because of her familiarity with the operation of the range, in leaning over it to see if the pilot light was on when ignition was delayed, without first turning off the gas leading to the burner. Upon this state of the evidence we think that plaintiff failed to adduce any evidence

of negligence on the part of defendant, and we have concluded that the court should have allowed defendant's motion for a directed verdict or for judgment notwithstanding the verdict. Accordingly the judgment of the Circuit Court is reversed and the cause is remanded with directions to enter judgment for defendant.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P. J., and NIEMEYER, J., Concur.

45435

144

CHARLES A. HILL, d/b/a PERFECT SERVICE GARAGE, Appellant,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
CLEMON LANGDON, WINTER & HIRSCH, INC., Appellees.	)	OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, Charles A. Hill, doing business as Perfect Service Garage, appeals from an order of the Municipal Court sustaining the motion of the defendant, Winter & Hirsch, Inc., to strike his amended statement of claim and to dismiss the suit. The following appears from the pleadings upon which the case was decided: August 11, 1950 plaintiff filed an amended statement of claim against the defendants Clemon Langdon and Winter and Hirsch, wherein he alleged that on February 12, 1949 Langdon brought a 1946 Pontiac sedan automobile to plaintiff and directed him to make repairs thereon; that Winter and Hirsch held title to the automobile under a conditional sales contract between Winter and Hirsch and Langdon; that Winter and Hirsch directed plaintiff to make the necessary repairs thereon, and promised to pay plaintiff the costs thereof; that after repairs, amounting to $320, were completed, the automobile was stored in a garage for safekeeping, and the defendants were notified; that the car remained in storage for a period of 100 days, from February 22, 1949 to June 2, 1949, at a charge stated in advance to be one

dollar per day, plus a towing charge of $19.30; that plaintiff expended the said sum of $119.30 for the use and benefit of defendants at their special instance and request which, together with the repairs on the car, aggregated $439.30. Winter and Hirsch appeared and moved to strike the amended statement of claim on the ground that it was res adjudicata, alleging that a prior judgment in a replevin suit brought by Winter and Hirsch had settled all issues involved in this contract action; in the replevin suit plaintiff—defendant there—had defended on the ground that he had a lien on the automobile for services rendered by him, but the court held otherwise.

In the trial of the instant case the parties entered into a stipulation of facts in lieu of a report of proceedings, which was approved by the court, wherein it was agreed that on and prior to May 31, 1949 Winter and Hirsch was the legal holder and owner of the Illinois negotiable document of title, dated November 19, 1948, made between Langdon as conditional purchaser and Standard Motor Sales, Inc., as conditional seller of the Pontiac automobile, and of the note described therein, and that the document of title and note had been assigned on November 19, 1948 by Standard Motor Sales to Winter and Hirsch for value received; also that, prior to the filing of the replevin, Langdon had defaulted in the payment of said note. It was agreed by the parties to the conditional sales contract that title to the car should vest in the seller and should not pass to the

purchaser until the installments of the note were paid; that the purchaser should keep the car free from all mechanics' liens, garagemen's liens and liens of every other kind; that the purchaser had no authority, express or implied, from the seller or its assigns to place or create any lien on said car by procuring any repairs to, labor or services on, or materials for, said car. The parties in the case at bar stipulated that the replevin suit was tried on its merits in the Municipal Court on July 1, 1949 and that on said date the court found the right of property in Winter and Hirsch, plaintiff in replevin, assessed its damages at one cent, and entered judgment on such finding for plaintiff, together with damages for one cent and costs.

Specifically, Winter and Hirsch contends, and the record supports the contention, that in the replevin suit Hill not only asked for a lien but also for judgment under section 22 of the Replevin Act (Ill. Rev. Stat. 1951, vol. 2, ch. 119). In his answer he stated that "he has a lien upon the within described motor vehicle as follows: $320.00 for repairs and parts; $19.30 - Storage and towing automobile***; $110.00 - Storage at the rate of $1.00 per day ***," aggregating $449.30; and he further averred that "said repairs, towing and storage was done at the special instance and request of one Clemon Langdon, owner of said automobile. Wherefore, Defendant states that he has a lien upon said motor vehicle for the amount of $449.30 and costs, prays judgment for said amount against the Plaintiff and costs."

Under section 22 he had the right to seek both remedies; and having done so, that judgment constituted an adjudication. In this proceeding plaintiff claims that Winter and Hirsch orally agreed to pay the bill; that question was determined adversely to plaintiff in the replevin suit. Section 22 of the Replevin Act afforded plaintiff in the replevin proceeding a complete remedy for the payment of the amount of his lien; if he could have shown that he rightfully held the Pontiac automobile as against Winter and Hirsch, the previous plaintiff, for the payment of money, he would have been entitled to the entry of a judgment in the alternative for the payment of the amount thereof; and since the replevin suit was tried on its merits by the court, which decided that Winter and Hirsch did not authorize repairs, towing or storage charges on the automobile and did not expressly or impliedly promise to pay for such services, plaintiff cannot relitigate that issue; it has already been adjudicated adversely to the present plaintiff and is conclusive upon him in the instant proceeding.

The gist of plaintiff's reasoning in this proceeding is that although he might have offered evidence in the lien suit to recoup the damages sustained, nevertheless he was not bound to do so but was at liberty to reserve his claim and to bring suit on it as he now does. In making this contention plaintiff apparently overlooks the fact that he not only pleaded his claim for lien and judgment in the prior replevin suit but introduced evidence in

support thereof at that trial; and the important circumstance is that he failed to prove Winter and Hirsch, previous plaintiff, had directly authorized or ordered repairs, towing and storage services for the automobile, and also failed to prove that Winter and Hirsch had promised expressly or impliedly to pay for them. This was the controlling question in the replevin suit; in other words, he failed to prove that he rightfully held the automobile as against the previous plaintiff, for the payment of any money; and having so failed, he cannot undertake to retry that issue here. In Fred C. Kramer Co., Inc. v. Hebard Storage Warehouses, Inc. (Abst.), 336 Ill. App. 150, which was an appeal from an order striking an amended complaint and dismissing the suit, we held: "In the action of replevin, if it was found that defendants had a lien upon plaintiff's property, arising out of its claim for labor performed, the court in the replevin action could ascertain the correct amount due, if any, and make the judgment for plaintiff conditional upon the payment of said amount. This is expressly authorized by section 22, chapter 119, Ill. Rev. Stat. 1947 * * *."

Plaintiff states that careful search has failed to reveal any Illinois authorities precisely in point; nevertheless, both parties cite various authorities in Illinois and elsewhere which need not be discussed inasmuch as we think the fundamental principles of res adjudicata and estoppel are determinative of the issues involved. The doctrine of res adjudicata extends not only to matters

actually determined in the former suit, but embraces all grounds of recovery and defense involved and which might have been raised. Lee v. Hansberry, 372 Ill. 369. See also Harding Co. v. Harding, 352 Ill. 417, and City of Elmhurst v. Kegerreis, 392 Ill. 195.

For the reasons stated we hold that the order entered by the Municipal Court sustaining Winter and Hirsch's motion to strike plaintiff's amended statement of claim and to dismiss the suit was proper and should be affirmed. It is so ordered.

ORDER AFFIRMED.

BURKE, P.J. AND NIEMEYER, J. CONCUR.

A

145

45466

PETER A. CLARK, Appellee, v. KOHL'S MOTOR TRANSFER COMPANY, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, Peter A. Clark, was injured while unloading merchandise from a truck owned by the defendant, Kohl's Motor Transfer Company, at the freight house of the Chicago River and Indiana Railroad Company. Plaintiff first brought an action against the railroad and subsequently made the transfer company an additional party defendant. His suit against the railroad was later settled, and an order entered dismissing the cause as to that defendant. In his second amended complaint plaintiff sought damages only from the transfer company (hereinafter referred to as defendant). The jury returned a verdict in his favor in the sum of $12,500. Defendant's motion for judgment notwithstanding the verdict or, in the alternative, its motion for a new trial was overruled, and judgment was entered against defendant on the verdict, from which it has taken an appeal.

Defendant was engaged in the business of trucking. Early in the morning of July 28, 1947 a semi-trailer type of truck belonging to defendant and driven by one of its employees had been backed up to the dock of the railroad freight house. The combined length of the four-wheel trailer-truck was estimated to be about twenty-four feet. The trailer

had an open top with solid sides which were approximately six to seven feet high, and was about seven to eight feet in width. The truck and trailer were standing at the dock of the freight house on the morning in question for the purpose of being unloaded. It was fully loaded and carried between thirty to fifty boxes, of various shapes and sizes, containing X-ray machine equipment from the General Electric Company. The boxes were marked with precautionary signs reading "Fragile," "This End Up," "Handle with Care," "Do Not Drop" and the like. There was no tailboard or tailgate on the truck, and the back was open. There were two large boxes, estimated by witnesses to be about three feet square and between six and seven feet in height, standing side by side in an upright position with only a few inches between them, occupying the full width of the trailer and placed at the rear end thereof. The weight of each of these two boxes was between 400 and 500 pounds. For the purpose of keeping the merchandise in the trailer en route to the freight house there were three strands of rope, spaced bottom, middle and top, stretched across the rear and outside of the two large boxes, and fastened to knobs on either side of the trailer. After the driver had backed up to the platform of the freight house he removed the ropes and then left the truck standing to be unloaded by the railroad company employees. He did nothing whatever in connection with the unloading of the trailer, and no employee of either the defendant or the General Electric Company assisted in or was present at the time the merchandise on the trailer was unloaded. The two

large boxes at the rear of the truck extended, according to estimates given by the witnesses, four to eight inches beyond the end of the floor of the trailer. Witnesses also estimated that the trailer was two to three inches higher than the unloading platform, and the edge of the truck floor overlapped the edge of the platform between six to eight inches.

At the time of the accident Clark, who was approximately seventy-three years old, had been in the employ of the railroad as a caller for about thirty years, and had worked in this particular freight house for five years. It was his duty to call the destination of the freight merchandise to the checker and to take such merchandise off the trucks or trailers hauling it to the freight house, and, with the assistance of other railroad employees, to unload it onto the two-wheel handtrucks and take it to the railroad cars for shipment. As the truck and trailer stood at the platform, plaintiff and three other employees of the railroad started to unload it. Plaintiff was the only one of the crew who had seen defendant's driver remove the ropes some time prior to the unloading process. The first box to be unloaded by the freight crew was that standing at the right rear end of the truck. James Norris, a railroad employee, was standing to the right, and plaintiff to the left, of that box. Plaintiff testified that he had lifted this particular type of box before and that in his opinion it weighed 430 to 450 pounds, and he judged the greater part of the weight to be at the top. He reached up, as did Norris, to tip the box forward so as to lower it onto the two-wheel handtruck being held in readiness by another railroad employee.

Norris testified that while lowering the box "it got sort of heavy on my side coming down and it fell on the [hand] truck." The fall of the heavy box as it hit the handtruck was, according to the evidence, of sufficient force to create a vibration which shook the second box, causing it to fall on plaintiff and injure him. Plaintiff testified that before it fell the box extended four to five inches over the trailer; that he took precautions while lifting the right-hand box, and that there was nothing about the left-hand box indicating that it would fall and hit him. Matthew Alelunas, another employee of the railroad company and a member of the unloading crew, testified that the right-hand box which plaintiff and his coworker Norris were unloading hit the two-wheel handtruck which he (Alelunas) was holding, causing considerable vibration or shaking, and "then by vibration another box fall right on Pete." All the witnesses who testified at the trial were employees of the railroad.

The complaint charged five specific acts of negligence against defendant as follows: (1) that defendant carelessly and negligently maintained, controlled and operated the X-ray machine equipment so that it fell upon plaintiff and injured him; (2) that it carelessly and negligently dropped the X-ray machine equipment so that it fell upon plaintiff and injured him; (3) that it carelessly and negligently failed to warn plaintiff before dropping or allowing to be dropped the X-ray machine equipment; (4) that it carelessly and negligently loaded the X-ray machine equipment onto its truck so that it fell upon plaintiff and injured him; and (5) that it carelessly and negligently fastened the X-ray

machine equipment to the tailgate of its motor truck with ropes which, when removed, caused the X-ray machine equipment to fall upon and against plaintiff.

As the principal ground for reversal it is urged that the plaintiff failed to adduce any evidence of negligence as charged in the complaint and that the court therefore erred in refusing to direct a verdict for defendant or in denying defendant's motion for judgment notwithstanding the verdict. Upon careful examination of the evidence we have concluded that this contention is well taken. There is no evidence to sustain plaintiff's specific charges of negligence. From his testimony and that of his fellow crewmen it appears that the falling of the box which was still unloaded and which caused the injury resulted from the vibration created by the fall of the first box on the handtruck; and this cannot be attributed to defendant because neither its driver nor any other person in its employ had anything to do with the unloading operation.

Plaintiff argues that certain inferences of wrongful conduct may be drawn merely from the happening of the accident; the rule is otherwise (Rotche v. Buick Motor Co., 358 Ill. 507; Huff v. Illinois Cent. RR. Co., 362 Ill. 95). One of the arguments advanced by him is that the jury may have found negligence because defendant failed to warn him that the box was top-heavy. There is no evidence that defendant knew of this particular circumstance, but from his testimony it is clear that plaintiff was fully aware of it. On trial he said: "I had lifted this particular type of box off before and I should judge the weight was on the top. You can tell

that when you are taking them off, the weight comes down faster because you got the light bottom--your weight is heavier at the top than at the bottom." The fact that plaintiff had had extensive experience in handling this type of freight qualified him at least as well as anyone else present to foresee that there was inherent danger in the unloading of the truck.

Plaintiff cites several decisions in support of his contention that an operator of a vehicle which is improperly loaded is liable for the consequences proximately caused by the improper loading. All these cases are clearly distinguished in defendant's reply brief; in each instance there was at least one affirmative act of negligence such as a wrongful movement of the vehicle or some part thereof; no such circumstance appears in the case at bar.

For the reasons indicated we are impelled to hold that upon the undisputed facts plaintiff failed to establish any negligence on the part of the defendant which proximately caused his injuries. Defendant's contention that plaintiff was not in the exercise of reasonable care and caution for his own safety at the time of the accident need not be discussed in view of this conclusion. Accordingly we are of opinion that the court should have directed a verdict in favor of defendant or entered judgment notwithstanding the verdict; therefore the judgment of the Superior Court is reversed and the cause remanded with instructions that judgment be entered in favor of defendant and against plaintiff.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P. J., and NIEMEYER, J., Concur.

A

146

45537

LOUISE A. RICHEY, Appellant, v. THELMA W. BURKE, Administratrix with the will annexed of the estate of LULA S. DUBISSON, deceased, THELMA W. BURKE, individually, D.J. DUBISSON, ROBERT J. WILLIAMS, D. J. WILLIAMS, GERALDINE DUBISSON LEE, and CORA MAE BARNES, Appellees.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY.

345 I.A. 218

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order, entered on motion of D. J. Williams, striking her amended complaint and dismissing her suit for money decrees against certain heirs at law and legatees under the last will and testament of Lula S. Dubisson, deceased, and a lien on real estate in Cook county of which decedent died seized to secure the payment of the decrees sought by plaintiff.

The parties to this litigation are related to Lula S. Dubisson, deceased. Plaintiff is a niece. Thelma W. Burke, defendant, individually and as administratrix with the will annexed of decedent (also an aunt of plaintiff), is a sister. D. J. Dubisson is the surviving husband, Robert J. Williams is a brother, and D. J. Williams a nephew. Geraldine Dubisson Lee is her daughter, and Cora Mae Barnes (a daughter of plaintiff) is her grandniece. Defendants Burke and Dubisson are residents of Arkansas. Robert J. Williams resides in Philadelphia. The remaining defendants

live in Illinois. No attempt was made to serve any process on Robert J. Williams and Lee. Burke and defendant Dubisson were notified of the pendency of the suit by service of summons in Arkansas. D. J. Williams and Barnes were served personally within the jurisdiction of the court.

The following allegations are accepted as true: Richard A. Williams, the father of plaintiff and brother of Lula S. Dubisson, died February 23, 1944 intestate, leaving plaintiff as his only heir at law. His estate was probated in Cook county, Illinois. Earl J. Neal, one of plaintiff's attorneys in this suit, succeeded the public administrator as administrator of the estate. Decedent was indebted to Lula S. Dubisson. The estate was closed June 28, 1945. The Dubisson claim was filed after the reopening of the estate in 1948. February 14, 1948 plaintiff told her aunt she would like to agree upon and make a settlement satisfactory to the aunt. The aunt then said if plaintiff would make a settlement of the claim, the plaintiff would receive under the aunt's will more than the amount of the claim. At the suggestion of her aunt, plaintiff conferred with Burke and offered in settlement of the claim two income producing pieces of real estate valued at $30,000 and producing a gross annual income of $6,250, and jewels left by her father of the appraised value of $19,000. This offer was not accepted. March 1, 1948, Dubisson executed a power of attorney to defendant Burke authorizing her to demand and receive payment of Dubisson's claim against the estate of plaintiff's father

and to compound, compromise or submit to arbitration any matter or thing relating thereto. On or about March 15, 1948 Burke had a conversation with plaintiff and her attorneys in Chicago in respect to the adjustment and payment of the claim. Burke informed them that if plaintiff would settle the Dubisson claim she would gain much more from the Dubisson estate because she was a beneficiary in the Dubisson will to an extent far in excess of the Dubisson claim of $44,000. March 30, 1948, Dubisson executed a last will and testament in which she bequeathed to plaintiff and her daughter, Cora Mae Barnes, the sum of $1.00 each. On April 16, 1948 she filed a sworn petition in the Probate court of Cook county for the reopening of the estate of plaintiff's father, the filing of her claim and an adjudication thereon by the court, in which she alleged that plaintiff's father was indebted to her in the sum of $40,778.82 for money loaned and interest thereon; that he died seized of approximately 19 pieces of real estate, of which 18 were improved, valued in excess of $100,000; that on September 28, 1944 she wrote the administrator of the estate setting out her claim against the decedent; October 22, 1944, Neal the administrator replied, acknowledging receipt of the statement of claim and stating, "your claim is going in with others of its class"; that no claim was filed and the estate was closed June 28, 1945 and the administrator discharged; that plaintiff herein, her attorney Clanton, and Neal, the former administrator in negotiations for the settlement of the claim extending into the year 1948, led her, Dubisson, to believe until March 19, 1948 that the claim had been filed, that it was being treated

as other claims and that the estate was still open. Plaintiff filed a motion to dismiss the petition, alleging among other grounds the want of jurisdiction of the Probate court to reopen the estate. An answer was filed June 22, 1948 denying many material allegations of the petition.

Various proceedings were had in the Probate court, including the taking of depositions in Arkansas, the introduction of oral testimony and arguments of counsel, resulting in a stipulation between the parties under date of August 31, 1948 "that all of the issues raised and involved in the instant proceeding growing out of the petition filed herein by the said Lula S. Dubisson shall be submitted for final determination to His Honor, Judge George M. Schatz, First Assistant to the Presiding Judge of this Court as the sole Arbitrator," and that his decision "shall be final and binding on all parties." On November 9, 1948 the arbitrator filed his decision, finding that the estate of plaintiff's father should be reopened for the allowance of the claim of Dubisson in the sum of $27,000 as a claim of the 7th class, and be paid—$4,500 in nine monthly installments of $500 each, and, if agreeable to claimant, by the transfer of two pieces of Chicago real estate to her, subject to an agreement permitting the repurchase of said property by plaintiff at a price of $22,500. On November 17, 1948 an order was entered in the Probate court approving the findings and award of the arbitrator and ordering that the estate be opened and the claim be allowed and paid as provided in the award of the arbitrator.

Dubisson objected to receiving the real property as part payment of her claim. No transfer of the property was made, and after further proceedings and the entry of an order in the Probate court the full amount of the claim was paid by plaintiff.

Dubisson died February 27, 1950, leaving as her last will and testament the will executed March 30, 1948. This will was admitted to probate in Pulaski county, Arkansas and defendant Burke was duly appointed administratrix of the estate with the will annexed in February, 1950. In May 1950, by order of the Probate court of Cook county, defendant D. J. Williams was appointed ancillary administrator of the estate.

April 10, 1950, plaintiff instituted this suit. By the first count of her amended complaint she alleges further that she never acknowledged the jurisdiction of the Probate court to open the estate of her father and adjudicate upon the Dubisson claim; that she abandoned her challenge of the jurisdiction of the court and submitted the claim to arbitration because of the promises made to her by Dubisson February 14, 1948, and by Burke as attorney-in-fact for Dubisson not later than on or about March 15, 1948; that by so doing plaintiff was maintaining her status as a substantial beneficiary under the Dubisson will, and that the payment by plaintiff of the $27,000 was induced solely by said promises, although plaintiff well knew at the time and long prior thereto that the claim was not well founded in law against her and that it could not be used as a legal

basis for reopening the estate. By the second count plaintiff charges further that under the will executed by Dubisson prior to March 30, 1948, plaintiff and her daughter were given legacies amounting to approximately $50,000, including an interest in three parcels of real estate in Cook county, Illinois, particularly described in the complaint; that in addition to said three parcels, Dubisson left real estate in the states of Arkansas and Oklahoma valued in excess of $100,000, and cash in excess of $50,000, of which plaintiff was originally to receive—definitely alloted to her in the prior will executed by Dubisson—a one-fourth interest; that by concealing from Dubisson the efforts of plaintiff to settle the claim against her father's estate, and by false representations to Dubisson, Burke induced her to change her will, thereby depriving plaintiff of a one-fourth interest in the real estate located in Cook county, and a large legacy theretofore provided for plaintiff in the prior will of Dubisson.

One of the grounds stated in the motion to dismiss, is that the complaint fails to show an amicable settlement of the Dubisson claim, a condition on which plaintiff's right to a large share in her aunt's estate rested. Plaintiff's interest in the Dubisson estate prior to the alleged promises of February 14th and March 15, 1948, was merely an expectancy. It could become a vested right only by the death of her aunt without changing her will, or by full compliance with the conditions imposed by the aunt—a satisfactory settlement of the claim against the estate of

plaintiff's father. This settlement was never made. At the meetings with her aunt and Burke, plaintiff did nothing more than express a wish to her aunt to agree upon a satisfactory settlement and make an offer of property which was not accepted. There is no allegation of any attempt to reach a settlement by agreement of the parties after the meeting with Burke in Chicago on March 15, 1948. The proceedings thereafter, from the filing of the petition to reopen the estate April 16, 1948, through the order of the Probate court allowing the Dubisson claim for $27,000 and directing its payment, were adversary proceedings. Plaintiff at all times denied the jurisdiction of the Probate court and contested the amount of the claim. Determination of these questions was left to the arbitrator. Both parties waived the right of appeal. The payment of the claim was under compulsion of the court order, based on the arbitrator's award. The judgment of the Probate court is conclusive against plaintiff. She does not allege that the amount awarded is excessive. Her sole objection is that the claim was not presented to the court when the court had jurisdiction. There is no basis in the complaint for a charge of unjust enrichment of Dubisson by the payment of her claim. The complaint negatives plaintiff's claim of making an amicable settlement of the indebtedness owing by her father and bars plaintiff's cause of action. Having reached this conclusion, it is unnecessary to consider other questions raised by defendants in support of the decision appealed from.

The order is affirmed.

ORDER AFFIRMED.

BURKE, P.J., AND FRIEND, J., CONCUR.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1952

A

2713

Term No. 5103

Agenda No. 9

346 I.A. 219

GEORGE RENNER, JR.,	)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of St. Clair County, Illinois.
vs.	)	
ELMER TOUCHETTE,	)	
Defendant-Appellant.	)	

CULBERTSON, P. J.

This is an appeal by Appellant, ELMER TOUCHETTE (hereinafter called defendant) from an order of the Circuit Court of St. Clair County entered February 2, 1951, wherein the Court found from the evidence that the abstract of votes and declaration of election was certified by the County Clerk to the Secretary of State on November 13, 1950, and that the complaint filed by Appellee, GEORGE RENNER, JR., (hereinafter called plaintiff), was filed in due time. The Court denied defendant's motion to dismiss said complaint. The action involved an election contest as to the office of County Clerk.

The Trial Court, on the record before us, saw the official record and noted that the County Canvassing Board completed the count and tabulation on November 13, 1950. The original abstract of votes cast for all offices as shown by the record was completed, filed and certified by the members of the County Canvassing Board on November 13, 1950. The complaint filed in the Circuit Court on December 12, 1950 alleged that the officers charged with the duty of canvassing the returns showed that defendant was elected, and the complaint alleged further grounds for contesting the election.

The defendant filed a special appearance in the Trial Court and objected to the jurisdiction of the Court, asserting that the complaint was filed on December 12, 1950, and that the canvass of the election was held and defendant was declared elected on November 10, 1950, being more than thirty days prior to the filing of plaintiff's complaint. Oral testimony of certain individuals was offered to the effect that the Canvassing Board completed and finished the canvass on November 10, 1950, and that the Canvassing Board told defendant what his total was on November 10, 1950. Certificates of Election were issued by the existing County Clerk on Monday, November 13, 1950. The Trial Court

The Trial Court granted a motion to strike all oral testimony which varied from the official record. This was proper since such records could not be challenged by parol evidence. Where public officials are required to keep a record of the proceedings in their offices, the record constitutes the only proper evidence of the action taken and cann t be contradicted, added to, or supplemented by parol, notably where such records show that an official is declared elected, his election certified, and his commission issued, and oath of office taken on a certain day (PATTERSON vs. CROWE, 385 Ill. 514). Prior to November 13, 1950, the County Canvassing Board made no official announcement of any election result. As indicated in the statement of facts, the Trial Court denied defendant's motion to dismiss and found that the action was duly filed. Defendant seeks to appeal from such order of the Trial Court denying the motion to dismiss.

On the record before us it is apparent that the order of the Trial Court is not final and appealable since it does not terminate the litigation on the merits of the case, nor determine the rights of the parties (McDONALD vs. WALSH, 367 Ill. 529).

We have given no consideration to the further issue raised that this Court does not have jurisdiction in election contest appeals under the positive statutory provision relating thereto

(1951 ILLINOIS REVISED STATUTES, Chapter 46, Section 23-30), in view of our conclusion that the order entered here was not final and appealable. This appeal will, therefore, be dismissed and the cause remanded to the Circuit Court of St. Clair County for further proceedings in the pending action.

Appeal dismissed.

Bardens, J., and Scheineman, J., concur.

(Publish Abstract only)

2653

stract

A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

February Term, A. D. 1952.

General No. 9801 | Agenda No. 7.

JAMES E. GALAWAY, a minor, by ELMO O. GALAWAY, his Guardian,
Plaintiff-Appellee,

vs.

A. H. THOMPSON,
Defendant-Appellant.

Appeal from The Circuit Court of Douglas County.

REYNOLDS, J.

The plaintiff, James E. Galaway, a minor, by Elmo O. Galaway, his guardian, brought action in the Circuit Court of Douglas County for injuries sustained as the result of a collision with defendant's automobile and the automobile of James Lucas, in which the plaintiff was riding as a passenger. The accident occurred on the night of July 26, 1950, between the hours of 8:00 P. M. and 9:00 P. M., upon a surfaced two-lane highway approximately three miles southwest of the City of Hindsboro, Illinois. The car in which the plaintiff was riding was following the defendant's car and had followed the car in a southerly direction for about one mile, when the defendant turned to the left at an intersection to go to his home off of the surfaced road.

The case was heard by a jury and resulted in a judgment for the plaintiff in the amount of $2,500.00, from which judgment the defendant appeals, contending primarily: (a) That the verdict was contrary to the manifest weight of the evidence; (b) that the amount of damages was excessive and based on conjecture and speculation.

Plaintiff's complaint alleged that the collision was the result of defendant's negligence and that he violated numerous sections of the Motor Vehicle Act, in failing to give signals of his intent to turn left when another automobile was traveling

immediately to the rear of defendant's motor vehicle, and other similar charges. The defendant's answer denied all of the material allegations of the complaint.

The plaintiff, James E. Galaway, nineteen years of age, being the only occurrence witness who testified for the plaintiff, testified that on the night in question he was riding as a passenger in an automobile proceeding in a southerly direction along a black top road; that the defendant's car was traveling in the same direction and that the car in which he was riding was gradually overtaking the car of the defendant as the car in which he was riding was traveling about sixty miles per hour and the car of the defendant was traveling about fifty miles per hour. He testified further that he did not know that there was an intersection where the accident occurred, until after the accident; that the driver of the car in which he was riding, signaled with his lights to pass the defendant's car and the defendant pulled over to the right; that when the defendant was about twenty feet from the intersection and the car in which he was riding, was twenty feet behind the defendant, the defendant slammed on his brakes and pulled across the road in front of the car that he was riding in. The plaintiff was thrown into the windshield, resulting in injuries to his right cheek and to his left and right eyes. He testified further that he had a numb spot on his forehead which had been from about four to six inches wide but had narrowed down to a small place on his forehead, which sometimes itched,at the time of the trial. He testified that he had a nerve cut in his eye which still bothered him. The defendant testified that he was driving at about forty-five to fifty-five miles per hour until within about one hundred and fifty feet of the intersection, when he put on his brakes; that he saw the lights of the car coming behind him and that the car was gaining on him; that he turned out of the south-bound traffic lane about fifty or sixty feet from the intersection; that he started to make a circle to turn and that his car

was in the north-bound traffic lane just the instant before it was struck. He stated that he saw the lights of the oncoming car for the last twenty-five feet that he traveled, shining on the road and that they were getting closer to him; that his wife said to him: "There comes a car" and he said: "yes" and that that was about thirty or fifty feet from the place where the collision occurred. He testified that he put his flasher signal into operation about twenty-five or thirty feet from the point of collision.

The defendant's wife testified, as did the defendant, that the Lucas car did not blink its lights. She further testified that the defendant turned on his directional lights as she saw them flashing. She testified that when she said: "There comes a car" and her husband said: "Yes", they were hit.

The defendant contends that owing to the fact that only the plaintiff testified as to the occurrence in question and that the defendant and his wife testified to a different state of facts, that the verdict is against the manifest weight of the evidence and cannot stand. The defendant further contends that the evidence does not prove that the plaintiff was in the exercise of due care for his own safety, at and immediately prior to the collision. In Jones v. Esenberg, 299 Ill. App. 551 at page 555, the court said: "Courts of review are reluctant to substitute their judgment for that of a jury upon controverted questions of fact, and while they have the power, and it is their duty to do so when convinced that the verdict is palpably against the weight of the evidence and that the jury in its rendition must have been moved by some ulterior and improper motive, yet such fact must clearly and unmistakably appear before the finding will for such reason be disturbed."

The evidence of the defendant and his wife, being the only witnesses for the defendant, was very unsatisfactory. The jury could well have believed from their testimony that the defendant's

negligence caused the injury.

The defendant contends that the plaintiff was guilty of contributory negligence because he did not warn the driver of the car in which he was riding. This court stated in Lasko v. Meier, 327 Ill. App. 5 at page 10: "We do not consider it to be the law that in every case a guest or passenger is guilty of contributory negligence merely because he says or does nothing at the time of or immediately before an accident. We believe in many cases a jury could well believe that the highest degree of caution in a particular case may consist of inaction on the part of a guest or passenger."

The plaintiff had no better opportunity to see the brake lights or directional lights of the defendant than did the driver of the car in which he was riding. From the plaintiff's evidence, he would never have had time to have warned the driver of the car in which he was riding, for the driver to have avoided the collision.

We have carefully reviewed the evidence and cannot say that the verdict was against the manifest weight of the evidence or that the damages were so excessive as to indicate some improper motive on the part of the jury. See Moffitt v. O. L. D. Forwarding Co., 331 Ill. App. 278 at page 284.

We have carefully reviewed the instructions objected to by the defendant and find no reversible error therein.

The judgment of the lower court is therefore affirmed.

Judgment affirmed.

3673 A

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

FEBRUARY TERM, A.D. 1952

346 I.A. 302

General No. 9792 Agenda No. 3

Sylvester Hines, Plaintiff-Appellee, vs. Donald F. Muirheid, Administrator of the Estate of Thomas A. Norman, Deceased, Defendant-Appellant.	Appeal from the Circuit Court of Macon County

Wheat, J.

This is a personal injury action arising out of a collision between two automobiles wherein Sylvester Hines is plaintiff-appellee, and Donald F. Muirheid, administrator of the Estate of Thomas A. Norman, deceased, is defendant-appellant. The cause was heard by the Court without a jury, the issues were found to be in favor of the plaintiff, and judgment was entered in the sum of $3,500.00. Nine days after entry of judgment, defendant filed a motion to vacate the same and for leave to introduce further evidence, which motion was denied, and this appeal follows.

The amended complaint substantially charges that the collision occurred May 26, 1949, at about 4:30 P.M. in the City of Decatur, Illinois, on East Eldorado Street, which is an east and west paved street forty feet wide, near a point where the tracks of a railroad cross said street; that plaintiff was driving his automobile westerly on said street on the right half thereof

[illegible]

APPELLATE COURT [illegible]

[illegible]

[illegible] 1910 [illegible]

Sylvester Lines,

[illegible]

vs.

[illegible]

Donald [illegible] of the [illegible] deceased,

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] between the [illegible] and Donald [illegible] Lines [illegible] nearly [illegible] favor of the [illegible] $200.00. [illegible] motion to [illegible] evidence, [illegible]

The [illegible] collision occurred [illegible] of December, Illinois, on East [illegible] and West paved [illegible] tracks of a railroad cross said street; that plaintiff was driving his automobile westerly on said street on [illegible] side of said [illegible]

at the point where said railroad tracks cross said street; that defendant's intestate, Norman, was driving his automobile easterly on said street at the point of intersection with said railroad tracks; that a city bus was parked or stopped on the south side of said street and to the west of said railroad tracks, and as plaintiff was proceeding westerly, said Norman made a sudden turning movement from behind said bus onto the north half of said street, by reason of which the two vehicles collided and plaintiff was injured.

The motion to vacate the judgment and for leave to introduce further evidence alleges that two of plaintiff's witnesses, Shep Willar, also known as Shep Willet, and A. D. McFarland were the only persons who testified as being eye-witnesses to the driving of his vehicle by defendant's intestate at and prior to the occurrence in question; that the testimony of each of such witnesses was false and a complete fabrication; that neither of said witnesses saw the matters about which they testified; that knowledge of the falsity of such testimony was not known by defendant at the time of trial, and that such lack of knowledge was not due to lack of diligence of defendant or his counsel. The motion was supported by a number of affidavits.

The testimony of the witness Willar or Willet at the trial was to the effect that he was employed at the same factory where plaintiff worked and knew him; that on May 26, 1949, the day of the collision, he quit work about 2:45 P.M.; picked up the witness McFarland in his car about 4:10 P.M.and after leaving the latter's home drove east on Eldorado Street; at about the intersection of Nineteenth Street, a block from the scene of the accident, a car passed him going about forty-five to fifty miles per

hour; it missed witness's car a couple of feet; as it continued it was weaving; an east-bound bus had stopped for the railroad crossing a foot or so from the south curb; a west-bound car was approaching on the north side of the street; the east-bound car passed the bus and was on the north side of the street and struck the west-bound car; after the collision the cars were locked together; plaintiff's car was eight or nine feet north of the center of the street and the other car was two or three feet north of the center; after the collision witness slowed down on a little side street on the corner of Twentieth and Eldorado Street and drove into a service station; he was about to get out and return to the accident scene when the attendant said he couldn't leave his car there; he waited until another car was serviced and then bought some gasoline, drove on Twentieth Street and parked.

The witness McFarland testified that Willar picked him up at his home about 4:14 on May 26, 1949, and eventually drove east on Eldorado Street; about two or three blocks from the railroad crossing an east-bound Mercury car passed them, almost sideswiped them; it was weaving and bobbing practically from one side of the street to the other going fifty to fifty-five miles per hour; it swung to the north to pass the stopped bus and hit the west-bound car; the bus was about one and one-half feet from the south curb; the collision occurred on the north half of the street; Willar turned his car into a filling station near the tracks near Twentieth and Eldorado Streets and said he would get three gallons of gas and check his tires, but the attendant told him he couldn't leave his car there, so he backed out and parked it on Twentieth Street; plaintiff's car was four and one-half to five feet north of the center of the street; except for the right rear, the east-bound car was north of the center of the

hour; it passed witness's car a couple of feet; as it continued it was weaving; an east-bound bus had stopped for the traffic and crossing a foot or so from the south curb; a west-bound car was approaching on the north side of the street; the east-bound car passed the bus and was on the north side of the street and behind the west-bound car; after the collision the cars were locked together; plaintiff's car was slight on the left front of the center of the street and the other car was two or three feet north of the center; after the collision witness stopped more on a little side street or the corner of Twentieth and Alvarado streets and drove into a service station; he was going to see her and return to the accident scene when the attendant said he could't leave the car there; he waited until another car was driven and then bought some gasoline, drove on Twentieth Street and returned.

The witness corroborated testimony that plaintiff was on her way home about 4:15, or 4:30, and westerly drove east on Alvarado Street; after two or three blocks from the railroad crossing on east-bound Alvarado Street, witness saw sideswipes two; it was weaving and bobbing erratically from one side of the street to the other going fifty to fifty-five miles per hour; it swung to the north to avoid the stopped bus and hit the west-bound car; the bus was about one and one-half feet from the south curb; the collision occurred on the north half of the street; Miller turned his car right a little; stopping near the tracks near Twentieth and Alvarado Streets, and said he would get three gallons of gas and check his tires, but the attendant told him he couldn't leave his car there, so he backed out and parked it on Twentieth Street; plaintiff's car was low and one-half to five feet north of the center of the street; except for the right rear, the east-bound car was north of the center of the

street headed northeast; the filling station was at the southeast corner of Twentieth and Eldorado Streets.

Supporting defendant's motion to vacate were certain affidavits. Robert D. Owen stated in his affidavit that he was employed to, and did, make an investigation as to the accident; that he inquired of the bus driver and at the police station for a list of witnesses and at no time did he learn that Willar and McFarland claimed to be witnesses until December 12, 1950; that following the trial he learned that the filling station in question closed down in the middle of April, 1949, and that the last delivery of gasoline to it was April 10 of that year; that the electric power consumption for the station from January 19, 1949, through February was 196 kilowatts; during March it was 92 kilowatts; through April 18 it was 48 kilowatts; that for the balance of April and all of May and June, it was 32 kilowatts; that the respective employers' records showed that McFarland checked out from work between 3:30 and 3:36 P.M. on the day of the accident, and that the hours of Willar were from 10:45 P.M. to 5:45 A.M. The affidavit of one Cassell is to the effect that he was a co-owner of the filling station; that in February, 1949, the station was leased to Baity and Smith who operated it during the early part of 1949; thereafter it was not operated until February, 1950. The affidavit of Herbert Smith states that in March and part of April, 1949, he and Baity operated the filling station and closed it in the middle of April, 1949, within three days after the last delivery of gasoline to it; upon closing there remained about sixty gallons of gasoline which was later used for his own purposes; that the station was not operated at any time in May, 1949; he had no knowledge of the accident at the time of its occurrence

street heading [illegible] east; and filling station was at the [illegible] corner of Dearborn and [illegible] streets.

Supporting [illegible] testimony [illegible] were various witnesses. [illegible] was employed in [illegible] and did [illegible] to the [illegible]; that he [illegible] for a [illegible] a line for a [illegible] witnesses [illegible] the [illegible] Mr. [illegible] testified [illegible] that [illegible] tion closed down [illegible] delivery [illegible]; that the electric power [illegible] through [illegible] was [illegible] watts; [illegible] of April [illegible] from work [illegible] and that the [illegible] The affidavit [illegible] owner [illegible] was issued to [illegible] part of [illegible] the affidavit of [illegible] April, [illegible] it in the middle of April, [illegible] delivery of gasoline to it; upon closing there remained about [illegible] gallons of gasoline which was later used for his own purposes; that the station was not operated at any time in May, [illegible]; he had no knowledge of the accident at the time of its occurrence

as the station was closed; this is the only filling station at that intersection. The affidavit of Robert S. Monroe states that Baity told him substantially the same matter as is in the Smith affidavit but refused to sign an affidavit. One Funk, a police officer, stated in his affidavit that he reached the accident scene about the same time as the ambulance; that he inquired as to witnesses and found none except an unidentified man who was in a car behind plaintiff's car, and who refused to give his name, and then drove away before witness could get his license number. Police Officer Scott said he was with Funk and found no witnesses; that he heard Willar and McFarland testify at the trial but had not seen either witness at the accident scene. The affidavit of Attorney Ralph J. Monroe tended to show diligence in investigating the matter and that the records of Willar's employer would show he worked only on one shift on May 26, 1949, and that was 10:45 P.M. to 6:45 A.M. of May 27th. The affidavit of one Harris is to the effect that he is an investigator for the Hargraves Secret Service; that he had numerous conversations with Willar between December 16 and December 20, 1950, and on the latter date Willar stated that about a year before a fellow told him he needed another witness to testify and asked him to do so; that he was at work in the factory at the time of the accident; that he had been paid $250.00 for testifying and expected more later.

The trial Court, in a written opinion of February 6, 1951, carefully analyzed the above affidavits and in denying the motion stated that numerous witnesses by testifying as to physical facts placed the collision in the north half of the street, that such was proved by a preponderance of the evidence, as well as the negligence of defendant's intestate being the proximate cause of the injury and the due care of plaintiff. This Court has care-

as the motion was closed; [illegible]
intersection. [illegible]
told [illegible]
out [illegible]
stated in his affidavit [illegible]
the same time as the accident; [illegible]
and found [illegible]
plaintiff's car, and [illegible]
away before witness could [illegible]
Scott said he was with [illegible]
Miller [illegible] the trial [illegible]
witness [illegible]
[illegible]
that [illegible]
on one [illegible]
of [illegible]
is an investigator [illegible]
[illegible]
20, [illegible]
before [illegible]
asked him [illegible]
of the accident; [illegible]
expected [illegible]

The trial [illegible]
carefully analyzed the [illegible]
stated that numerous [illegible]
placed the collision [illegible]
was proved by a preponderance [illegible]
negligence of defendant's intestate being the [illegible]
the injury and the due care of plaintiff. [illegible]

fully reviewed all of the evidence and finds that if the evidence of Willar and McFarland is excluded there is an almost total failure to show due care on the part of plaintiff. Their testimony was material to the issues. Under the showing made it was an abuse of the trial court's discretion not to reopen the case for the purpose of introducing the testimony which might impeach such witnesses.

The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

Reversed and Remanded.

183

45792

PEOPLE OF THE STATE OF ILLINOIS ON THE RELATION OF JOHN S. BOYLE, STATE'S ATTORNEY OF COOK COUNTY, Appellant,	APPEAL FROM
v.	SUPERIOR COURT
THE BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, HARRY A. LIPSKY, Individually and as Chairman, WILLIAM B. DALY and MABEL G. REINECKE, Individually and as Members of THE BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, JAMES H. MESI, and RICHARD J. DALEY, COUNTY CLERK OF COOK COUNTY, Appellees.	COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing his amended petition asking that a writ of mandamus issue directing the County Clerk of Cook County to file with the Board of Election Commissioners an amended certificate of candidates for Republican ward committeeman in the 31st ward of the City of Chicago, omitting the name of defendant James H. Mesi as one of the Republican candidates to be voted on at the primary election to be held on April 8, 1952, and directing the Board of Election Commissioners to omit the name of Mesi from the Republican ballot as a candidate for ward committeeman in the 31st ward of Chicago. The record, abstract and briefs of plaintiff were filed March 12, 1952, the last day for filing an appeal to be docketed at the April term. On the same day plaintiff made a motion for an early consideration and hearing of the cause. On presentation of

the motion, all parties being represented by their respective counsel, the filing of further briefs was waived and the cause submitted to the court on the merits.

This action is brought by plaintiff as State's Attorney of Cook County. The Board of Election Commissioners of the City of Chicago, the members of the commission, James H. Mesi, candidate for election as Republican committeeman of the 31st ward of the City of Chicago, and the County Clerk of Cook County, are defendants. The complaint recites that a petition was filed with the County Clerk of Cook County for and on behalf of the defendant James H. Mesi, 911 N. Pulaski Road, Chicago, Illinois, for election to the office of ward committeeman of the Republican Party in the 31st ward in the City of Chicago at the primary election to be held on Tuesday, April 8, 1952; that no objections to this petition were filed with the County Clerk of Cook County as required by section 13 of article 7 of the Elections Act (Ill. Rev. Stats., 1951, chap. 46); that defendant Mesi had stated to plaintiff that he and Charles Gross, his opponent for the position of ward committeeman, had agreed that neither of them would contest the other's petition; that on February 13, 1952 the defendant Mesi and said Charles Gross were certified by the County Clerk to the Board of Election Commissioners of the City of Chicago as candidates for ward committeeman at the election of April 8, 1952; that the defendant Mesi is not a resident of the 31st ward of the City of Chicago in which he seeks election as ward committeeman,

and is not a qualified voter in said ward and legally qualified to hold the office or position of ward committeeman therein. The prayer of the petition is that a writ of mandamus be issued directed to the Board of Election Commissioners and the individual members thereof "not to print the name of James H. Mesi as a candidate for election as ward committeeman on the Republican ballots in the 31st Ward of the City of Chicago, at the primary election to be held on Tuesday, April 8, 1952." The defendants Board of Election Commissioners, its individual members, and the County Clerk of Cook County, answered the petition. The defendant Mesi moved to strike the petition and dismiss the suit. The trial court, having heard arguments of counsel for the respective parties, ordered that the motion to dismiss the cause be sustained and said suit be dismissed.

Under section 13, article 7 of the Elections Act, the Board of Election Commissioners in cities of 200,000 or more population having such board, shall constitute an electoral board for the hearing and passing upon objections to nomination petitions for ward committeemen. It is further provided that "Such objections shall be filed in the office of the county clerk not less than sixty-seven days prior to the primary. The objection shall state the name and address of the objector, who may be any qualified elector in the ward, the specific grounds of objection and the relief requested of the electoral board." The Board of Election Commissioners is constitued an electoral board for the sole purpose of "hearing and passing

upon objections to nomination petitions for ward committeemen," and such objections must be filed not less than 67 days prior to the primary, or February 1, 1952, in the instant case. The right to file such objections is further limited to "any qualified elector in the ward." The agreement, if any, between Mesi and his opponent not to file objections, did not foreclose the filing of such objections by a qualified voter in the ward, provided that the objections were filed not less than 67 days before the primary. The members of the Board of Election Commissioners cannot function as an electoral board unless and until objections to the nominating petition of a candidate for ward committeeman are properly filed with the County Clerk and certified by him to the commissioners. The defendants, members of the electoral board, being without power to pass upon the sufficiency of the nominating petition of the defendant Mesi and his qualification for the position which he sought, without objection being made by a qualified elector in the ward filed in apt time, the court could not confer this power on the defendants by a writ of mandamus. Hooper v. Snow, 325 Ill. 53; Peo. ex rel. Brecheisen v. Board of Review of Lake County, 363 Ill. 106. Furthermore, in passing upon such objections, properly filed, the electoral board acts in a quasi-judicial capacity in exercising its judgment and discretion in respect to the validity of the nominating petition before it. The court could not in a mandamus proceeding determine the question to be decided by the electoral board and direct it not to print the name of a candidate upon the ballot. Coughlin v. Chicago Park District,

364 Ill. 90. For like reasons the court could not in a mandamus proceeding direct the county clerk to omit the name of defendant Mesi from his certificate of candidates.

For these reasons the court properly dismissed plaintiff's suit. Consideration of other objections raised to the petition is unnecessary. The order appealed from is affirmed.

ORDER AFFIRMED.

Friend, J., Concurs.

188

45491

ANGELO PALELLO, Appellant,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
MARIE PALELLO, Appellee.	)	COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On February 24, 1948 Angelo Palello filed suit for divorce from his wife Marie, charging cruelty, and desertion on November 27, 1947, without cause. Thereafter, on April 2, 1948 Mrs. Palello filed her answer, denying the alleged acts of cruelty and desertion. At the same time she filed her countercomplaint for separate maintenance, alleging that on November 27, 1947 her husband had wilfully deserted her. March 31, 1949 Palello filed his amended complaint for divorce, omitting the specific charges of cruelty and re-affirming the allegations as to desertion. Mrs. Palello was given leave to have her answer and countercomplaint stand as the answer to the amended complaint. She then filed a petition for temporary support and attorney's fees, and on June 7, 1949 an order was entered granting her support money and fees for her counsel. When the case was reached for trial on October 23, 1949, on Palello's motion his amended complaint for divorce was dismissed because the statutory period of desertion charged had not expired, and the hearing proceeded on Mrs. Palello's crosscomplaint for separate maintenance. At the conclusion of the trial the court found that Mrs. Palello "has been and is now living separate and apart from

the cross-defendant, without any fault on the part of said cross-plaintiff"; that she was entitled to separate maintenance; and accordingly the court entered a decree in her favor, from which Palello appeals.

It appears from the evidence that in the winter of 1930 or 1931 Palello, who had long resided in the United States, visited his birthplace in Italy, where he was married. Because of the expiration of his passport privileges, he returned to the United States during the summer following his marriage. His wife was then pregnant, and he testified that he sent her twenty to twenty-five dollars each month, except during the war, when he could not send any money. Mrs. Palello testified that he sent her support money only every five or six months, but not enough to support her and the child. Late in 1945, or early in 1946, after an interim of some fifteen or sixteen years, Palello arranged to have his wife join him in the United States, and sent funds to be used for her transportation and that of their son, who was then about fourteen or fifteen years old. The two of them arrived in this country on June 23, 1947, and the parties lived together until November 27 of that year. Apparently they were incompatible from the beginning, and quarreled constantly.

The controversy with respect to the desertion is traceable to the events occurring on November 27, 1947, Thanksgiving Day. The Palellos and their son were invited to Thanksgiving dinner at the home of Mrs. Palello's uncle.

They had a family discussion during which Palello said that he was not feeling well, and he suggested that his wife and son should go to the dinner without him; they acted on his suggestion. Mrs. Palello took no change of clothes with her, because she intended to return home. The son Joseph, who had by that time found gainful employment and was earning forty dollars a week, returned home the following day. He testified that his father asked whether his mother was coming home, and he told him that she was; that Palello told him that he was going away; that "I am not going to stay any longer, because I don't like to stay with your mother"; that in response to Joseph's inquiring the reason for his father's attitude, he replied that "she is not young like the other women," and that "some day" he was leaving. Three days later, when Joseph returned home from work, he found that his father had left, and had taken with him all his clothes, a trunk and a radio. When Mrs. Palello returned home a week later, she found that her husband was not there, and he has never returned to her, nor has she or her son ever received any call from him, nor has either one of them seen him except during the court proceedings.

There is of course considerable conflict in the evidence as to the cause of the quarrels and bickerings had between the parties prior to their separation. It is certain, however, that they have been living separate and apart since November 27, 1947. Therefore, in order to sustain her crosscomplaint, it was incumbent upon Mrs. Palello only to

prove by a preponderance of the evidence that she was living separate and apart from her husband without fault on her part. Judd v. Judd, 169 Ill. App. 21. Palello devotes considerable space in his brief to the contention, on the one hand, that his wife deserted him and was therefore not without fault in the separation; and, on the other hand, to the proposition that he left and abandoned her but with justification, and that she was therefore not without fault. He bases his theory of her desertion on her leaving, in company with their son, to attend the Thanksgiving Day dinner; when, conversely, he is admitting desertion on his part, he attempts to justify it on the ground of their previous quarrels. With respect to the first contention, it clearly appears that the invitation to the Thanksgiving Day dinner was discussed between husband and wife and their nineteen-year old son, and that Palello told them to go to the dinner. Since Mrs. Palello took no change of clothes with her and did return home, it is evident that she had no intention of staying away. Contrariwise, the immediate departure by Palello with all his belongings, and the early filing of his complaint for divorce thereafter, indicate that he was resolved to leave his wife, and apparently welcomed the opportunity to be separated from her. There is considerable evidence about the details of the preceding quarrels; some related to financial matters, some to the intimacies of their private life--that he talked to her abusively, that he criticized her housekeeping, and, according to his testimony, that she

refused to cohabit with him; as to the latter charge, she testified that he did not want her companionship--she was, so he told her, different from other women, and he went on to inform her that he could get better women than she--fifteen- or sixteen-year old girls.

At the conclusion of the hearing, the chancellor, in his summation of the evidence, stated that the testimony indicated that Palello had left of his own accord and deserted his wife, and that the preponderance of the evidence was clearly in her favor. There is no evidence of such misconduct on her part as would justify desertion of her on the part of her husband. The law is well settled that where the decree is clearly not against the manifest weight of the evidence, it should not be disturbed. After a careful examination of the record, we have reached the conclusion that the chancellor's findings warranted the decree, and it is therefore affirmed.

DECREE AFFIRMED.

Burke, P. J., and Niemeyer, J., Concur.

189

45557)
45558) Consolidated
45559)

CITY OF CHICAGO, a Municipal Corporation,

Appellant,

v.

NORA M. FERRIN,

Appellee.

CITY OF CHICAGO, a Municipal Corporation,

Appellant,

v.

MARY DANIELS,

Appellee.

CITY OF CHICAGO, a Municipal Corporation,

Appellant,

v.

DELVENA BYRNES,

Appellee .

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Complaints filed in the Municipal Court by the City of Chicago charged Nora M. Ferrin, Mary Daniels and Delvena Byrnes with maintaining homes for aged or infirm persons without obtaining licenses, in violation of section 136-2 of the Municipal Code. The causes were tried concurrently without a jury. Plaintiff's motions for a directed finding and for summary judgment were overruled, and judgments entered for defendants. The city appeals. By stipulation of the parties the causes were here consolidated, and the parties were given leave to file one set of briefs.

Defendants operated, for profit, establishments for the care of men and women of advanced years, some of whom had sufficient financial means of their own so that they were not dependent upon public charity or private philanthropy, and others who were dependent on old-age pensions. None of the defendants were licensed to conduct homes for the "aged or infirm." In the establishment of Nora M. Ferrin, the ages of the inmates, nineteen in all, were between sixty-four and eighty-six, and fourteen of them were old-age pensioners, as were the inmates in the Fr. Basil case; those residing in the home of Mary Daniels, ten in all, were between the ages of sixty-one to eighty; and the twelve residents in Delvena Byrnes's home ranged in age from seventy-two to eighty-eight. Doctors attached to the medical staff of the Board of Health testified that some of the persons residing in the three homes here under consideration suffered from various maladies; four were blind; one had a fractured hip; and there were, in addition, two or four bed-ridden inmates.

The question presented is whether defendants operated homes for the aged or infirm, as defined in section 136-1 of the Municipal Code of Chicago, without a license, as required in section 136-2, or whether they maintained boarding houses, as they contend, which were not subject to the provisions of the code.

We had occasion to consider this precise question in City of Chicago v. Heffron, Gen. No. 45598 (filed 3-18-52). In the Heffron case, as in the cases presently before us,

defendant conducted a home for people of advanced years, many of whom had physical disabilities and were infirm. What we said there with reference to contentions commonly made, is applicable to the questions here raised, and need not be repeated. We have reached the conclusion in these causes, as we did in the Heffron case, that defendants maintained homes for the reception and care of aged or infirm persons, as defined in section 136-1 of the code, without obtaining a license therefor, as required in section 136-2, and that the court should have found for plaintiff and entered judgments in its favor. The ordinance provides a minimum and a maximum fine for each offense, and it will be necessary for the trial court to assess the fines against each of the defendants. Accordingly, the judgments of the Municipal Court are reversed, and the causes remanded for the sole purpose of having the court determine the amount of the fines to be assessed.

JUDGMENTS REVERSED AND
CAUSES REMANDED WITH DIRECTIONS.

Burke, P. J., and Niemeyer, J., Concur.

190

45624

PEOPLE OF THE STATE OF ILLINOIS, ex rel. THOMAS H. PAPWORTH, Appellee, v. ROY E. YUNG, Director of the Department of Agriculture of the State of Illinois, MAUDE MYERS, President, and MICHAEL GREENEBAUM, Members of the Illinois State Civil Service Commission; CHARLES MAIWURM, Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

People of the State of Illinois, ex rel. Thomas H. Papworth, on February 20, 1951 brought an action in mandamus to compel the Director of the Department of Agriculture and the members of the Illinois State Civil Service Commission to certify the names of the two successful candidates, including that of the relator, from the eligible register for the position of Executive I (Grain Inspection) in the classified service of the Department of Agriculture, and to compel the Director of the Department to fill the vacancy existing in said position by the appointment of one of the two candidates on the eligible register. After plaintiff had voluntarily amended his complaint, defendants moved to dismiss; their motion having been overruled, they elected to stand thereon; the court entered judgment for the writ of mandamus; and defendants appeal.

It appears that there is a vacancy in the position of Executive I (Grain Inspection) in the Division of Chicago Grain Inspection in the Department of Agriculture of the State.

The Civil Service Commission has on file an eligible list for that position upon which appear only two names, Frank K. Smith in first place, and Thomas H. Papworth, the relator, in second place. The Commission, holding that an eligible list that contains fewer than three names is a nullity under the statute, has refused to certify this list, as a result of which the Director of the Department of Agriculture has made no appointment therefrom. The position is presently held, under provisional appointment, by Charles Malwurm who took and failed the examination which both Smith and Papworth passed. The question presented is whether, when the eligible list contains only two names, the Commission is required to certify those two names, and whether the appointing officer is required to appoint one of the two persons whose names appear on such list. The applicable part of the Civil Service Act (Ill. Rev. Stat. 1949, ch. 24 1/2, par. 12) provides as follows: "Whenever a position classified under this Act is to be filled, the head of the department or office in which such position is to be filled shall notify said commission of that fact, and the commission shall certify to the appointing officer the names and addresses of the three available candidates standing highest upon the eligible list for the class or grade to which said position belongs, * * *." Counsel say that the precise point has never been passed upon by the reviewing courts of this state. However, in Atkinson v. Fleming, 222 N.Y.S. 415, the court, in construing a similar statute, decided that the appointing officers are entitled to the latitude afforded by a choice of one from

a list of at least three candidates certified to them by the civil service commission, and concluded that to hold otherwise would be destructive of the principle of appointment lodged in the appointing authority and would pratically confer it on the examiners. In State v. Lesser, 94 Ohio St. 387, 115 N.E. 33, the question was an academic one inasmuch as there the appointing authority had made the appointment from the list submitted without insisting that the civil service commission supply it with an eligible list of at least three persons; but the court added that "it is perhaps true that the appointing authority may demand that three names shall be certified to it upon an eligible list before it is required to make an appointment, even if further examinations are necessary to be held in order to secure such a list * * *." In People ex rel. Lynch v. City of Chicago, 271 Ill. App. 360, the problem arose under promotional provisions for the position of sergeant of police governed by section 9 of the Civil Service Act which, as set out in the opinion, provided that"'it shall be the duty of the commission to submit to the appointing power the names of not more than three applicants for each promotion having the highest rating.'" The court held that this constituted authority for the Commission to submit the names of three applicants for each promotion "so as to give a discretion to the appointing power as to which of the three shall be appointed. (See McDevitt v. Finn, supra [248 Ill. App. 339].) And, clearly, under these provisions of the section, the commission should not be compelled to certify the name of but one."

Relator takes the position that an eligible register is not a nullity because only two names appear thereon, and that it is the duty of the Civil Service Commission and the appointing officer to fill vacancies from such an eligible list; also, that the Civil Service Commission and the appointing officer have no right to make and approve a provisional appointment to fill a vacancy when there is an eligible list for the position from which the vacancy could be filled. It seems to us, however, that the Legislature made it clear that it intended to give the appointing officer an opportunity to indicate his preference for one candidate to be chosen from a group of three and thus afford a latitude to the appointing officer in making the selection. It is conceivable that there could be but one candidate on an eligible list, and in that situation the automatic appointment of one candidate, even though he should be the sole candidate found currently eligible, would destroy the choice evidently contemplated by the Legislature.

In their reply brief defendants call our attention to the fact that the Legislature, on July 23, 1951, amended the law pending this appeal so as to make the act read in part as follows: "and the commission shall certify to the appointing officer the names and addresses of <u>not less than three</u> available candidates in order of their standing upon the eligible list for the class or grade to which said position belongs, * * *." (Italics ours.) Whatever doubt may have existed, the language of this amendment is decisive

of the question presented. Relator, in his typewritten suggestions, argues that the amendment does not change the law with respect to the question under consideration. We agree with this contention because, as we interpret the statute before it was amended, the appointing officer had the right to insist that he be supplied with a list of three certified candidates so that he could exercise his discretion in choosing one; the amendment does, however, clarify the statute by expressly providing that the Commission shall certify "not less than three available candidates." Obviously the Legislature contemplated that the appointing officer shall have at least three certified persons before he is required to fill the vacancy from the list, thus giving effect to the principle of choice of person as an important factor in the certification of eligibility.

For the reasons indicated we are of opinion that the court erred in issuing the writ of mandamus, and the judgment appealed from is therefore reversed.

JUDGMENT REVERSED.

Burke, P. J., and Niemeyer, J., Concur.

Gen. No. 10569 Agenda No. 5

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

346 I.A. 305

- - -

February Term, A.D. 1952

SAMUEL M. RADZYNER, doing business as Prevue Radsell Company, Plaintiff-Appellee, vs. GEORGE R. KOESLING, doing business as Columbia Industries, Defendant-Appellant.	Appeal from the Circuit Court of Lake County, Illinois

Dove, P. J.

The parties hereto, in November, 1946, entered into a written agreement which recited that the defendant, George R. Koesling, had completed the construction of a complete set of dies which had been ordered by the plaintiff, Samuel M. Radzyner, and which were to be used to stamp out the necessary parts for the construction of a patented Memo-Pal machine owned by the plaintiff; that the total price of these dies was $1850.00, of which amount $1000.00 has been paid by plaintiff to defendant and the balance of $850.00 was to be liquidated during the existence of the contract. The agreement then provided that these dies were to be retained by defendant and used in doing

Gen. No. 10589 Agenda No. 5

In Ban

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

February Term, A.D. 1950

SAMUEL M. RADZYNER, doing business as Prairie Badgell Company,	
Plaintiff-Appellee,	Appeal from the
vs.	Circuit Court of
GEORGE R. KOESLING, doing business as Columbia Industries,	Lake County, Illinois
Defendant-Appellant.	

Dove, P. J.

The parties hereto, in November, 1946, entered into a written agreement which recited that the defendant, George R. Koesling, had completed the construction of a complete set of dies which had been ordered by the plaintiff, Samuel M. Radzyner, and which were to be used to stamp out the necessary parts for the construction of a patented Gamo-Pal machine owned by the plaintiff; that the total price of these dies was $1850.00, of which amount $1000.00 has been paid by plaintiff to defendant and the balance of $850.00 was to be liquidated during the existence of the contract. The agreement then provided that these dies were to be retained by defendant and used in doing

all the necessary punch press operations as ordered by plaintiff for the construction of these Memo-Pal machines; that plaintiff would furnish all the necessary steel to enable defendant to stamp out parts for 50,000 to 100,000 Memo-Pal machines and deliver the steel to the premises of the defendant; that subject to orders all of said parts so stamped should be delivered either to the painters designated by plaintiff or to the Sherman Metal Manufacturing Company for a total price for stamping, forming operations and spot welding of $69.00 per thousand and that at the conclusion of the contract, or on demand, defendant agreed to deliver to the plaintiff the dies, being the property of the plaintiff, in good condition and that upon a breach of any of the requirements of the contract the agreement may be cancelled by either party by thirty days' notice in writing, the cancellation to become effective at the end of such thirty-day period.

Thereafter, Samuel M. Radzyner filed the instant complaint alleging that pursuant to this contract he delivered to the defendant, George R. Koesling, 80,540 pounds of steel and that defendant made and delivered to the plaintiff 46,064 units of said Memo-Pal machines, in the making of which he used 69,069 pounds of steel, leaving on hand 11,444 pounds of steel; that defendant, through error, also stamped 11,200 tops for the machine using 8,400 pounds of steel and leaving 3,044 pounds of steel unused; that the stamping of said 11,200 tops was erroneously done in that defendant furnished these 11,200 tops pieces without any bottom pieces and that the top pieces were useless and were in the possession of the defendant. The complaint then alleged that the plaintiff had paid $911.82 for slitting

all the necessary punch press operations as ordered by plaintiff for the construction of these Kemo-Pal machines; that plaintiff would furnish all the necessary steel to enable defendant to stamp out parts for 50,000 to 100,000 Kemo-Pal machines and deliver the steel to the premises of the defendant; that subject to orders of said parts to stamped out a part be delivered either to the painters designated by plaintiff or to the Sherman Metal Manufacturing Company for a total price of [illegible] stamping, forming operations and spot welding of [illegible] per thousand and that at the completion of the contract, or on demand, defendant agree to deliver to the plaintiff the dies, being the property of the plaintiff, in good condition and upon a breach of any of the requirements of the contract the agreement may be cancelled by either party by thirty days' notice in writing, the cancellation to become effective at the end of such thirty-day period.

Thereafter, Samuel H. Sodeyman filed the instant complaint alleging that pursuant to this contract he delivered to the defendant, George A. Dowling, 80,[illegible] pounds of steel and that defendant made and delivered to the plaintiff 47,054 units of said Kemo-Pal machines, in the making of which he used 50,000 pounds of steel, leaving on hand 11,444 pounds of steel; that defendant, through error, also stamped 1,[illegible] tops for the machine using 8,400 pounds of steel and leaving 3,044 pounds of steel unused; that the stamping of said 1,[illegible]00 tops was erroneously done in that defendant furnished these 11,200 tops pieces without any bottom pieces and that the top pieces were useless and were in the possession of the defendant. The complaint then alleged that the plaintiff had paid $211.82 for stitching

the 80,540 pounds of steel and had paid $2,059.92 for the 11,444 pounds of steel remaining in the possession of the defendant, and that the fair and reasonable cost of slitting said 11,444 pounds of steel was at least $111.00. The complaint further alleged that the defendant had purchased of the plaintiff a table for $185.00, which table was delivered to the defendant by the plaintiff, and averred that the defendant has failed and refused to pay therefor. It was then averred that the plaintiff on his part had performed all of the conditions of the contract to be performed by him and that the defendant had failed and neglected to perform his part of said agreement, all to the damage of the plaintiff of $4,086.74.

The answer of the defendant admitted the execution of the contract and admitted the delivery of the steel by the plaintiff, as provided in the contract, and averred that it was used in the construction of the Memo-Pal units. The answer then alleges that in the course of their dealings there were frequently overruns of either tops or bottoms and that the amounts of tops and bottoms did not match on many occasions. It was then averred that it was the duty of the plaintiff, under the contract, to furnish the steel necessary to enable the defendant to stamp out the bottoms in order to equal the overrun of tops for the machine; that plaintiff failed to do so and thereby made it impossible for defendant to perform the contract. The answer denied the allegations of the complaint with reference to the purchase by the defendant of a table from the plaintiff. Subsequent to filing his answer, the defendant, by leave of court, filed a counterclaim seeking to recover an alleged balance of $600.00 on the purchase price of $1850.00

the 80,540 pounds of steel and [illegible],[illegible] for the 11,444 pounds of steel remaining in the possession of the defendant, and that the full [illegible] of [illegible] said 11,444 pounds of steel was [illegible]. The complaint further alleges that [illegible] of the plaintiff a check for $[illegible], which [illegible] to the defendant by the plaintiff, and [illegible] has failed and refused to pay [illegible]. It was [illegible] that the plaintiff on his part [illegible] of the conditions of the contract [illegible] by the defendant and fully [illegible] agreement, [illegible] of the plaintiff [illegible].

The answer of the defendant [illegible] the contract and [illegible] plaintiff [illegible] provided in the contract, [illegible] used in the [illegible] when alleged that [illegible] frequently [illegible] amounts of [illegible] it was then [illegible] the contract, [illegible] defendant to [illegible] run of [illegible] and thereby made it impossible for the defendant to perform the contract. The answer denied the allegations of the complaint with reference to the [illegible] by the defendant of a check from the plaintiff. Subsequent to filing the answer, the defendant, by leave of court, filed a counterclaim seeking to recover an alleged balance of $600.00 on the purchase price of $1250.00

for the dies which were completed and used by the defendant pursuant to the contract. Plaintiff replied denying the allegations of the counterclaim and averred that the contract had been assigned by defendant to Columbia Enterprises, Inc., an Illinois Corporation.

The issues made by the pleadings were submitted to the court without a jury, resulting in a judgment against the defendant and in favor of the plaintiff for $2355.92 and against the counterclaimant in bar of the counterclaim. To reverse this judgment, the defendant appeals.

The evidence discloses that the defendant, at the time this contract was executed, was engaged in the manufacture of tools and dies, and the Memo-Pal referred to in the contract is a patented article stamped out of a flat strip of twenty-five gauge steel. Blanking and forming dies are used in the process, and the top and bottom of each unit are made separately. The forming consists of three press operations, and when the pieces are formed, they are complete except for painting, which was done by another contractor. Shortly after the contract was executed, appellee delivered to appellant 80,540 pounds of steel. Various quantities of tops and bottoms were thereafter manufactured and delivered, and from this 80,540 pounds of steel appellee received 46,064 complete units -- tops and bottoms. On October 29, 1947, it was discovered by appellant that he had made an overrun of 11,200 tops and there was no steel left to stamp out the bottoms. Thereafter appellant insisted upon appellee furnishing more steel, and appellee insisted that appellant procure the steel and stamp out a sufficient number of bottoms so the tops could be used.

for the dies which were completed and used by the defendant pursuant to the contract. Plaintiff replied denying the allegations of the counterclaim and averred that the contract had been assigned by defendant to Columbia Enterprises, Inc., an Illinois Corporation.

The issues made by the pleadings were submitted to the court without a jury, resulting in a judgment against the defendant and in favor of the plaintiff for $2335.00 and against the counterclaimant in bar of the counterclaim. To reverse this judgment, the defendant appeals.

The evidence discloses that the defendant, at the time this contract was executed, was engaged in the manufacture of tools and dies, and the machinery referred to in the contract is a patented article stamped out of a flat strip of tempered-alloy spring steel. Flanges are formed, flat for use in the process, and the top and bottom of each unit are made separately. The forming consists of three press operations, and when the pieces are formed, they are complete except for plating, which was done by another contractor. Shortly after the contract was executed, appellee delivered to appellant 33,540 pounds of steel. Various quantities of tops and bottoms were thereafter manufactured and delivered, and from this 80,340 pounds of steel appellee received 46,064 complete units -- tops and bottoms. On October 26, 1947, it was discovered by appellant that he had made an overrun of 11,000 tops and there was no steel left to stamp out the bottoms. Thereafter appellant insisted upon appellee furnishing more steel, and appellee insisted that appellant procure the steel and stamp out a sufficient number of bottoms so the tops could be used.

No agreement was reached, but at the request of appellee the dies for the bottom parts were delivered by appellant to appellee and they were in possession of appellee at the time of the hearing. Appellant retained the top dies, and at the time of the hearing the top dies and the 11,200 tops were in appellant's possession. On January 20, 1950, the instant complaint was filed.

It is insisted by counsel for appellant that, under the contract, appellee had a duty to furnish appellant with enough steel to equal the overrun of the 11,200 tops and not having done so, that it was he, appellee, who thereby abandoned the contract. The contract provided that appellee was to furnish the necessary steel to enable appellant to furnish fifty thousand to one hundred thousand units. Appellee did furnish 80,540 pounds of steel which the evidence discloses was more steel than was necessary to produce the minimum amount of units required by the contract. Appellee was under no obligation, according to the terms of the contract, to provide steel in excess of the amount he did furnish. Appellee testified that he had sent to appellant all the steel he was able to get under his Civilian Production Allotment. Appellant testified he was able to get steel at eight cents per pound but appellant refused to pay that amount for it. This, however, was denied by appellee.

Counsel for appellant argue that a slight non-compliance with the terms of a contract by one party will not authorize the other party to the contract to abandon it and contend that the evidence discloses that overruns of tops or bottoms were frequent and that the overrun of 11,200 tops was only a slight non-compliance with the provisions of this contract. There is no

No agreement was reached, but at the request of appellee the dies for the bottom parts were delivered by respondent to appellee and they were in possession of appellee at the time of the hearing. Appellant retained the top dies, and at the time of the hearing the top dies and the 11,500 tops were in appellant's possession. On January 30, 1920, the instant complaint was filed.

It is insisted by counsel for appellant that, under the contract, appellee had a duty to furnish appellant with enough steel to equal the output of the 11,[illegible] tops, and not having done so, that it was appellee, who thereby breached the contract. The contract provides that appellee is to furnish the necessary steel to enable appellant to produce 11[illegible], shovels, to one hundred thousand units. Appellee did furnish 10,000 pounds of steel which the evidence discloses was more steel than was necessary to produce the maximum amount of units required by the contract. Appellee was under no obligation, according to the terms of the contract, to provide steel in excess of the amount he did furnish. Appellee testified that he had been to great [illegible] all the steel he was able to get under the Priorities Production Allotment. Appellant testified he was able to get steel at eight cents per pound but appellant refused to pay that amount for it. This, however, was denied by appellee.

Counsel for appellant argue that a slight non-compliance with the terms of a contract by one party will not authorize the other party to the contract to abandon it and contend that the evidence discloses that overruns of tops or bottoms were frequent and that the overrun of 11,500 tops was only a slight non-compliance with the provisions of this contract. There is no

merit in this contention. Appellant's non-compliance with his agreement was a substantial one. What the record here discloses is that as early as November 25, 1946, appellee wrote appellant telling him the inventory then showed 457 more bottoms than tops and asked him to run the 457 extra tops to equal the bottoms. On January 11, 1947, appellee wrote appellant: "It will be necessary to adjust the difference of the tops to balance out the excess stamping of tops. One is useless without the other. We will give you the exact count of extra bottoms needed to complete the tops only which we have, as soon as you are ready. Thereafter they should be in complete units -- tops and bottoms of equal quantity." On October 1, 1947, appellee again wrote to appellant, following a telephone conversation, reminding appellant not to forget to send eleven hundred tops as appellee had that many bottoms on hand. It cannot be seriously contended that appellant should be permitted to receive from appellee 11,444 pounds of steel and use it up by stamping out 11,200 tops and no bottoms when he knew his contract called for units and that tops without bottoms were of no use or value.

Appellant further insists that the evidence discloses that appellee was damaged not by the act of appellant but by his conduct, calling our attention to the fact that on October 12, 1948, appellant delivered the bottom dies to appellee thus preventing appellant from running any more bottoms to match the tops. This, however, was almost a year after all the steel which appellee had furnished appellant had been used up in making the excess number of tops, and was after appellant had refused to procure any steel or further proceed with the provisions of the contract. Appellee, in this connection, testified that he procured these dies from

merit in this contention. Appellant's non-compliance with his agreement was a sufficient one. Since the record here discloses it that on sunday, November 25, 1956, appellee wrote appellant telling him the inventory from somewhere [illegible] bottoms then tops and asked him to run the 60 inches [illegible] equal the bottom. On January 11, 1957, appellee wrote [illegible] "It will be necessary to adjust the difference of the [illegible] balance out the excess straight of tops. One is [illegible] the other. We will give you the exact count [illegible] needed to complete the tops only which [illegible] are ready. Therefore they should be in [illegible] bottoms or [illegible]. On October 8, 1957, [illegible] wrote to appellee, following a telephone [illegible] appellant not to forward the seven hundred tops as appellee had that many bottoms on hand. It cannot be seriously contended that appellant should be permitted to require [illegible] pounds of steel and use it up by weighing out 1,200 tops [illegible] bottoms when he knew his contract called for 600 [illegible] without bottoms were of no use or value.

Appellant further claims that the evidence showed that appellee was damaged not by the act of appellant but by its conduct calling our attention to the fact that on December 11, appellant delivered the bottom [illegible] to appellee thus preventing appellant from running any more [illegible] to match the tops. It is, however, was almost a year after all the steel which appellee had furnished appellant had been used up in making the seven hundred of tops, and was after appellant had refused to produce any steel or further proceed with the provisions of the contract. Appellee, in this connection, testified that he procured these ties from

appellant in an effort to have the bottoms stamped out by a different contractor on his own presses but that was found to be impracticable.

In assessing the damages which appellee had sustained, the trial court found that 46,064 complete units were received by appellee and calculated that one and one-half pounds of steel were used in each unit, aggregating 69,096 pounds of steel. Deducting this amount from the 80,540 pounds delivered by appellee to appellant left 11,444 pounds. It was stipulated at the trial that a qualified witness, if present, would testify that the value of such steel was eighteen cents per pound and that the fair and reasonable charge for slitting the same would be one cent per pound. Appellee testified to the same effect. The value of the 11,444 pounds of steel at eighteen cents per pound would be $2,059.92; adding to this $111.00 for slitting and $185.00 for the table, the aggregate amount is $2,355.92, and it is for this amount the lower court rendered judgment. Counsel for appellant state that the evidence discloses that 48,111 units were furnished appellee instead of 46,064 units upon which the court made its computation, but appellee testified positively that from the 80,540 pounds of steel which he furnished appellant he received 46,064 units, and the undisputed evidence is that after the contract was executed but before any steel was furnished appellant by appellee, the parties hereto determined the amount of steel required per unit, including wasteage, was 1 3/10 pounds. In his testimony and in making his calculations appellee assumed 1 1/2 pounds of steel was used for each completed unit, and it was the testimony of appellee and his calculation which the trial court accepted and followed, and in so doing, it cannot be said that its findings and judgment are not sustained by the evidence.

appellant in an effort to have the bottoms stamped out by a different contractor on his own presses but that was found to be impracticable.

In assessing the damages which appellee had sustained, the trial court found that 46,064 complete units were received by appellee and calculated that one and one-half pounds of steel were used in each unit, representing 69,096 pounds of steel. Deducting this amount from the 89,536 pounds delivered by appellee to appellant left 11,444 pounds. It was stipulated at the trial that a qualified witness, if present, would testify that the value of such steel was eighteen cents a pound and that the fair and reasonable charge for utilizing the same would be one cent per pound. Appellee testified to the same effect. The value of the 11,444 pounds of steel at eighteen cents per pound would be $2,059.92; adding to this $13.00 for stitching and $80.00 for the table, the aggregate amount is $2,152.92, and it is for this amount the lower court rendered judgment. Counsel for appellant state that the evidence discloses that 46,111 units were furnished appellee instead of 46,064 units upon which the court made its computation, but appellee testified positively that from the 89,540 pounds of steel which he furnished appellant he received 46,064 units, and the undisputed evidence is that after the contract was executed but before any steel was furnished appellant by appellee, the parties hereto determined the amount of steel required per unit, including wastage, was 1 9\10 pounds. In his testimony and in making his calculations appellee assumed 1 1\2 pounds of steel was used for each completed unit, and it was the testimony of appellee and his calculation which the trial court accepted and followed, and in so doing, it cannot be said that its findings and judgment are not sustained by the evidence.

It is also insisted that there is no basis in the evidence found in this record to sustain a recovery of $185.00 for the table. Appellee testified: "Mr. Koesling bought a table from our company in March or April, 1947. In the preceding months he bought punch presses and desks and some other equipment and those were paid for. This table was about 60 feet long, T shaped. The width was about four feet and it had a masonite top. It was knocked down in four sections when taken apart. The amount was $250.00 but Mr. Koesling said he wouldn't pay more than $185.00. We said it was $185.00 and he said he would take it." The evidence further shows that a receipt for it was given when it was picket up on April 14, 1948. In answer to the court's injury, David Alexander, a witness on behalf of appellant, testified: "I know about the table they have out there. It is made out of two by fours and just common lumber. It is all rust. The top is a sheet of masonite. Its only use is just laying stuff on, that's all. It was made out of two by fours and not painted or polished. I would say it is about fifteen feet long. It is one solid table. The legs are six or seven feet apart." Appellant testified: "We picket up the table in April, 1948. Mr. Radzyner had to get out of his building. He said he still had the table and asked if I wanted it. I told him I didn't want to pay anything for it. He told me he had to get out and he would give me the table for nothing. I told him I would have the truck pick it up. The truck driver brought the table to our place. I still have the table. If I have to pay $185.00 I return the table immediately and pay the hauling cost. I can't use it. . . . . Mr. Radzyner never sent a

It is also implied that there is no doubt in the evidence found in this report to an item a recovery of $185.00 for the table. Appellee testified: "[illegible] bought a table from our company in Reno on April, 1947. In the preceding month we bought parts [illegible] and some other equipment and these were paid for. This table was about 42 feet long, T shape. The width was about four feet [illegible] a marble top. It was [illegible] in four sections on [illegible] apart. The amount was [illegible] but [illegible] pay more than $125.00. [illegible] it was $165.00 [illegible] would take it." The evidence shows that [illegible] it was given when it was picked up, April 14, 1948. In answer to the counsel's inquiry [illegible] Lorenzen, [illegible] behalf of appellant, testified: "[illegible] have out there. It is made out of two by four [illegible] lumber. It is all [illegible]. The top is above a veneer. The only use is just laying [illegible] on, [illegible] it by Tonne and not painted or polished. [illegible] it is about fifteen feet long. It is [illegible] and [illegible] six or seven feet apart." [illegible] the table in April, 1948. Mr. Rodgers [illegible] out of the building. He said he still has the [illegible] and asked if I wanted it. I told him I didn't want to pay anything for it. He told me he had to get out and [illegible] for nothing. I told him I would have the truck pick it up. The truck driver brought the table to our place. I still have the table. If I have to pay $125.00 I return the table immediately and pay the hauling cost. I don't use it. . . . . Mr. Rodgers never sent a

bill for the table. . . . He never mentioned a table for R185.00 in any conversation I had with him." Again, whether appellee's version of this phase of the transaction between the parties to the effect that the table was sold to appellant for $185.00 or appellant's version that it was a gift was a question of fact for the trial court to determine, and we are not disposed to interfere with the conclusion the trial court arrived at.

It is finally insisted that there was no defense interposed by appellee to appellant's counterclaim. What the record discloses is that this claim was listed by appellant as belonging to Columbia Enterprises, Inc., a corporation, in the bankruptcy proceeding of that corporation. How it thereafter became the property of appellant does not appear from the record. The trial court properly dismissed the counterclaim.

Out conclusion is that the trial court was warranted in finding that appellee furnished appellant all the steel he was obligated to furnish under the contract; that appellee paid for all the units which appellant delivered to him; that appellee was not required to do any more than he did do in order to remedy appellant's admitted mistake; that the overrun of 11,200 tops, and the consumption in so doing of the steel furnished appellant by appellee, was not a slight non-compliance with the terms of the contract but was a substantial breach thereof, and that the findings and judgment of the trial court are warranted by the evidence found in this record. The judgment appealed from is therefore affirmed.

Judgment affirmed.

bill for the table. . . . He never mentioned a table for $1385.00 in any conversation I had with him." Again, whether appellee's version of this phase of the transaction is given the parties to the effect that the table was sold to an client for $1385.00 or appellant's version that it was a gift was a question of fact for the trial court to determine, and we are not disposed to interfere with the resolution the trial court made.

It is finally insisted the court erred in denying appellant's motion for a new trial based by appellee to appellant's counsel. The motion discloses is that this claim was filed by [illegible] claiming to be Columbia Broadcasting, Inc., a corporation, in a garnishment proceeding of [illegible] corporation. For if there is [illegible] the property of appellant [illegible] the trial court properly [illegible] the motion.

The conclusion is that the trial court was warranted in finding that appellee furnished supplies on which [illegible] was obligated to furnish under the contract; that appellee [illegible] for all the units which appellant delivered to him; that appellee was not required to do any more than he did in order to remove appellant's alleged defects; that the revenue of $1,500 type and the consumption in co-coin of the equipment furnished appellant by appellee was not a flagrant misapplication of the terms of the contract but was a substantial compliance with it; and that the finding and judgment of the trial court are warranted by the evidence found in this record. The judgment appealed from is therefore affirmed.

Judgment affirmed.

K 2743

Abstract

Gen. No. 10581 Agenda No. 11

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

346 I.A. 305

February Term, A.D. 1952

FRANK TOCCO, Plaintiff-Appellant, vs. VINCE YATES, Defendant-Appellee.	Appeal from the County Court of La Salle County, Illinois.

Dove, P. J.

On August 21, 1951, the plaintiff filed in the County Court of La Salle County his complaint alleging that on October 1, 1949, he leased to the defendant, by a verbal agreement, a single family dwelling located at 327 East Michigan Street in the City of Ottawa, Illinois, at a stipulated rental, and that the defendant was delinquent in his rental at the time the complaint was filed in the sum of $506.00. The complaint also alleged that the defendant failed to dispose of garbage and rubbish, failed to keep the yard in a sanitary condition, and otherwise failed to maintain the premises in the condition in which they were received while he remained in possession of the premises, which was until August 1, 1951, and that by reason thereof plaintiff was further

Gen. No. 10581 [illegible]

IN THE

MUNICIPAL COURT OF [illegible]

[illegible]

[illegible]

[illegible], 1951.

[illegible],	
Plain tiff-Appellant,	[illegible]
vs.	[illegible]
[illegible] YATES,	[illegible]
[illegible] Defendant-Appellee.	

[illegible]

[illegible], J. D.

[illegible] 4th, 1951, the plaintiff [illegible] in the [illegible] Court of [illegible] County [illegible] 1949, he leased to the defendant, by a written [illegible] single family dwelling [illegible] the City of Ottawa, [illegible] defendant was delinquent [illegible] was filed in the sum of [illegible] the complaint [illegible] the defendant failed to [illegible] to keep the yard in a sanitary condition [illegible] maintain the premises in the condition in which they were received while he remained in possession of the premises, which was until August 1, 1951, and that by reason thereof plaintiff was further

damaged in an additional amount of $500.00. The verified complaint prayed judgment for $1005.00.

To this complaint, the defendant filed his verified motion to strike or dismiss the complaint. This motion averred: "That the subject matter of the said complaint is the same subject matter which has been heretofore adjudicated and judgment entered thereon in the Court of Justice of the Peace, George Koenig, of the City of Ottawa, of La Salle County, State of Illinois; that said judgment was entered on July 22, 1951, and has never been appealed from; that further, the subject matter of said complaint is the same subject matter which is the basis of another suit between the parties hereto and that said suit was instituted on August 7, 1951, in the Court of Justice of the Peace, George T. Koenig, of the City of Ottawa, County of La Salle, State of Illinois; that said suit was dismissed on August 14, 1951; that further your petitioner herein is informed on information, and belief, that there has been an attempt to appeal this last case referred to. Therefore your petitioner respectfully represents to this court that the complaint herein should be ordered stricken and declared null and void."

On October 10, 1951, the plaintiff filed his verified motion suggesting that the motion of the defendant to strike or dismiss the complaint should be overruled. This motion set forth the docket entries of the Justice of the Peace, George T. Koenig. The docket entry in the first case is dated July 10, 1951, and recites that the cause was called for trial at ten o'clock, A.M., that day; that the attorneys for the

damaged in an additional amount of $[illegible].00. The verified complaint prayed judgment for $1000.00.

To this complaint, the defendant filed his verified motion to strike or dismiss the complaint. This motion averred: "That the subject matter of the said complaint is the same subject matter which has been heretofore adjudicated and judgment entered thereon in the Court of Justice of the Peace, George Koenig, of the City of Ottawa, of La Salle County, State of Illinois; that said judgment was entered on July 20, 1951 and has never been vacated from; that further, the subject matter of said complaint is the same subject matter which is the basis of another suit between the parties hereto and that said suit was instituted on August 7, 1951, in the Court of Justice of the Peace, George T. Koenig, of the City of Ottawa, County of La Salle State of Illinois; that said suit was dismissed on August 24, 1951; that further your petitioner herein is informed on information and belief, that there has been an attempt to appeal this last case referred to. Therefore your petitioner respectfully represents to this court that the complaint herein should be stricken with and dismissed full and total."

On October 10, 1951, the plaintiff filed his verified motion suggesting that the motion of the defendant to strike or dismiss the complaint should be overruled. This motion set forth the docket entries of the Justice of the Peace, George T. Koenig. The docket entry in the first case is dated July 10, 1951, and recites that the cause was called for trial at ten o'clock, A.M., that day; that the attorneys for the

respective parties appeared and the docket entry then concluded: "it is agreed by the parties hereto that the plaintiff have and recover of the defendant Wm. Vincent Yates the possession of the premises known as the one-story frame house at 327 E. Michigan Street in the City of Ottawa, Illinois and with cost of suit and it is hereby ordered by the Court that judgment be due the same is hereby entered therefor - Writ of Restitution not to issue until August 1, 1951." The entry in the second case referred to in the motion of the defendant to strike according to the motion of the plaintiff suggesting that the court overrule the motion of the defendant to strike recites that the case was called for trial on August 14th, 1951, at eleven o'clock, A.M., that the plaintiff did not appear and that the attorney for the defendant "makes a motion to dismiss for want of prosecution. Motion allowed."

On the same day the record shows that plaintiff filed a second verified motion suggesting to the court that the defendant's motion to strike should be overruled and that defendant should be defaulted. These motions were heard and taken under advisement on August 10, 1951, and thereafter, on October 22, 1951, the record recites that the following order was filed in the Office of the Clerk of the County Court of La Salle County, Illinois:

"State of Illinois)) SS. County of La Salle)		In the County Court Thereof.
FRANK TOCCO, Plaintiff vs. VINCE YATES, Defendant	)	At Law No. 19856

"On August 21, 1951, plaintiff filed his Complaint herein for rent and damages. Defendant has

respective parties [illegible] the docket entry [illegible] conclusion: "It is agreed by the parties [illegible] in this civil [illegible] possession of the premises [illegible] at 527 E. Michigan [illegible] with [illegible] judgment in the [illegible] stipulation not to issue [illegible] the second case referred [illegible] entire recording to the [illegible] that the court overruled [illegible] realize that the case [illegible] 1981, at eleven o'clock [illegible] [illegible] the [illegible] [illegible] [illegible]

[illegible]

Filed a second verified [illegible] motion suggesting [illegible] the defendants should be defaulted. [illegible] filed in the Office of the Clerk of the County [illegible] [illegible] Cook County, Illinois

State of Illinois)
County of Cook)

PRAIRIE [illegible],	
Plaintiff,	
vs.	AD [illegible]
VIMOE YAMES,	
Defendant	

"On August 21, 1981, plaintiff filed its Complaint herein for rent and damages. [illegible]

filed a motion to strike because of the bar of a prior judgment. Plaintiff has attacked the motion to strike by two separate motions, the first of which alleges that the motion to strike should be overruled because the defects alleged in said motion do not appear on the face of the complaint and are not supported by affidavit.

"In his motion to strike defendant has set forth two judgments entered in the Justice Court of George T. Koenig, a Justice of the Peace of La Salle County, Illinois. The motion is verified.

"Supreme Court Rule 13 provides that in a pleading a judgment ... it shall be sufficient to state the date of its entry and describe its general nature and allege generally that the judgment ... was duly made or given.

"The Court finds that defendant's motion to strike appears to fully comply with this section. See Marshall vs. New Hampshire Casualty Co. of Baltimore, 318 Ill. App. 636. Nichols Illinois Civil Practice, Vol. 2, Page 28, and Fin's Illinois Motion and Petition Practice, Sec. 89. Accordingly plaintiff's first motion to overrule the motion to strike is overruled.

"Plaintiff has filed a second motion to overrule defendant's motion.

"The law is so well settled here that it is unnecessary to cite decisions. Accordingly that objection raised by plaintiff's second motion to overrule the motion to strike is overruled and the objections set forth in defendant's motion to strike will be allowed to stand.

filed a motion to strike because of the bar of a prior judgment. Plaintiff has attacked the motion to strike by two separate motions, the first of which alleges that the motion to strike should be overruled because the defects alleged in said motion do not appear on the face of the complaint and are not supported by affidavit.

"In his motion to strike defendant has set forth two judgments entered in the Justice Court of George T. Koenig, a Justice of the Peace of La Salle County, Illinois. The motion is verified.

"Supreme Court Rule 12 provides that in pleading a judgment ... it shall be sufficient to state the date of its entry, and describe its general nature and allege generally that the judgment ... was duly made or given.

"The Court finds that defendant's motion to strike appears to fully comply with this section. See Marshall vs. New Hampshire Casualty Co. of Chicago, 212 Ill. App. 220. Modern Illinois Civil Practice, Vol. 2, Page 72, and Ill. Illinois Motion and Petition Practice, Sec. 82. Accordingly plaintiff's first motion to overrule the motion to strike is overruled.

"Plaintiff has filed a second motion to overrule defendant's motion.

"The law is so well settled here that it is unnecessary to cite decisions. Accordingly that objection raised by plaintiff's second motion to overrule the motion to strike is overruled and the objections set forth in defendant's motion to strike will be allowed to stand.

"Accordingly both the plaintiff's motions are overruled and ~~plaintiff's~~ defendant's motion to strike which was also before the Court at this time, will be allowed.

"It is ordered that the action is dismissed.

"/s/ Walter Dixon,

Acting Judge."

The record shows that this order bears the following endorsement:

"No. 19356.

"County Court of La Salle County

Frank Tocco
v
Vince Yates

Order

Filed October 22, 1951

George L. Hunter

Clerk of the County Court

La Salle County

Illinois"

Thereafter on November 7, 1951, a notice of appeal was filed in the County Court reciting that the plaintiff appealed from the order entered on October 22, 1951, "wherein plaintiff's action was ordered dismissed." On November 19th, 1951, the following order was entered in this cause, viz.: "Now on this day, on the Court's own motion, It is ordered that the scrivener's error, in the next to the last paragraph

of the order of this Court entered herein on October 22, 1951, be and the same is corrected on the face of said order by inserting the word 'defendant's' where the word 'plaintiff's' appears."

The record in this case does not show any final judgment. The order signed by the court and filed with the clerk on October 22, 1951, was a mere memorandum of the judge from which a formal judgment might have been written up, but this was not done. While no particular form is required in proceedings of a court to constitute a judgment, still it is necessary that there should be an entry containing the essential elements of a judgment which show that the court finally disposed of the case. This order was never expanded by the Clerk. It is not a final judgment, and no final judgment was ever entered. (City of Alton v. Heidrick, 248 Ill. 76,80.)

In The Chicago Portrait Co. v. The Chicago Crayon Co., 217 Ill. 200, the record showed that the court sustained a general demurrer of the defendant to the declaration and that the plaintiff elected to stand by the declaration and thereupon the following judgment was rendered: "Therefore it is considered by the court that the defendant do have and recover of and from the plaintiff its costs and charges in this behalf expended and have execution therefor." The Supreme Court, in reversing the judgment of the Appellate Court with directions to dismiss the appeal, said: "The judgment was not final and the statute only authorizes appeals from final judgments. The circuit court merely sustained a demurrer to the declaration,and neither adjudged that the plaintiff take nothing by the writ or that the defendant go hence without day, and the judgment contained no words of similar

meaning." The court then went on to hold that a court finding it has no jurisdiction of a cause should dismiss it upon its own motion.

In Aetna Plywood and Veneer Co. v. Robineau, 336 Ill. App. 339, the judgment sought to be reviewed recited that the court found the complaint to be insufficient in law to sustain plaintiff's action and "ordered that said complaint be and the same is hereby dismissed at the plaintiff's cost." The court stated that the rule announced in the Chicago Portrait Company case has not been modified by the Civil Practice Act or by any subsequent opinion. The court quoted from Board of Education of Grant Community School District v. Board of Education of Richmond-Burton Community High School District, 301 Ill. App. 228, and dismissed the appeal holding that this order was not a final appealable judgment.

In Board of Education v. Board of Education, 301 Ill. App. 228, supra, this court said:/ (at page 229) "Where a motion to dismiss a complaint, which is in the nature of a demurrer, is sustained, for such ruling to become final, a judgment should be entered for the defendant to the effect that the plaintiff take nothing by virtue of such action and that the defendant go hence without day, or words of similar import and meaning."

In Kircher v. Hamill, 239 Ill. App. 496, (p.497) it was said: "An appeal lies only from a final order, judgment or decree except in such cases as are expressly authorized by statute. An Order sustaining or overruling a demurrer to a bill, declaration or petition is merely interlocutory and no appeal lies therefrom,

as to justify an appeal there must be a final order or decree in a chancery suit or a final judgment in a suit at law. To be appealable, the order, judgment or decree must contain language to the effect that the party take nothing by the writ or that the defendant go hence without day" (citing cases).

Under the authorities, this appeal must be dismissed.

Appeal dismissed.

45519

204 A

CHRISTINE HALL, Plaintiff and Counterdefendant, Appellant, v. INTERNATIONAL HARVESTER COMPANY, a corporation, Defendant, IDA C. PETERSON, Defendant and Counterclaimant, Appellee.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

346 I.A. 306

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action by the sister of decedent Harry Peterson for recovery of $2,000 death benefits under a certificate of insurance of the Employees Benefit Association of the International Harvester Company. Peterson's widow answered and filed a counterclaim in which she also claimed the death benefits. The Harvester Company was dismissed from the suit by stipulation after it deposited the amount of the death benefits with the clerk of the court. The issues were tried by the court without a jury and findings were for the widow. Plaintiff has appealed from the judgment on the findings.

The decedent entered the employ of the Harvester Company in 1898. He became a member of the Benefit Association on January 16, 1909. After his employment ceased January 1, 1934, his certificate was continued for $2,000 death benefits. May 5, 1943 he designated plaintiff as beneficiary. July 1, 1944 he married defendant Ida C. Peterson. They lived together as husband and wife until his death August 10, 1949. Both sister and widow demanded of Harvester Company payment of death benefits. It refused to pay except upon judicial determination of the rightful claimant.

The issues revolved about the construction of regulations of the Association and the provisions of decedent's membership certificate. There were no questions of fact. The question of law before us is whether the trial court's construction was correct.

The widow sought the benefits under two theories: first, that she should be compensated for funeral and other expenses for decedent under one paragraph of section 3 of Article 14 of the regulations of the Association, and second, that she was the beneficiary of a trust created by the designation of plaintiff as beneficiary under another paragraph of section 3 of Article 14. These regulations were binding on Peterson "and those claiming through" him. The judgment assessed the widow's "damages" at $2,000 and found that she was entitled to recover the entire fund on deposit with the clerk in full payment of her "damages." The clerk was ordered to pay her the $2,000 on deposit in "full payment of her damages."

The paragraph of section 3 on which the widow's first theory of recovery depends provides: "A part of the death benefit may, at the discretion of the Manager, be advanced for funeral or other expenses incident to the member's death." Over plaintiff's objections, the widow was permitted to show the expenditure of $1,921.08 for medical, nursing and hospital care of Harry Peterson, and for the cost of his burial. If the judgment was to compensate the widow under this regulation, we think the judgment is erroneous. Any advance under the regulation

depended on the manager's discretion. There was no showing that he was asked to advance a "part" of the benefits. He did not make the advance, and the court had no right to do so.

The regulation in section 3 upon which the widow's second theory is based provides:

> "A member may . . . designate . . . special beneficiaries (who must ordinarily be dependents of the member or near relatives trusted to use the payments for the benefit of the deceased member's dependents) and if . . . the Manager approves such designation . . . the beneficiary . . . if he survives the member, shall be paid the death benefit in lieu of the persons who would otherwise take the same as provided above."

Under this regulation, the widow claims as a dependent for whose benefit plaintiff, a near relative of decedent, was designated to take the fund. Plaintiff also sues under that regulation. She sues not as a dependent of her brother but as a specially designated beneficiary to be paid the benefits at Peterson's death in lieu of those who would otherwise have taken "as provided above." Plaintiff admits she is not a dependent. She was approved as a specially designated beneficiary and the designation was not revoked despite her brother's marriage about fourteen months later.

One of the regulations "provided above" is that the beneficiary of a "death benefit only membership . . . shall be:

(a) The wife . . . if living . . .

. . . .

(d) Then the member's brothers and sisters . . ."

This table of beneficiaries was modified by the subsequent provision for special beneficiaries. In other words, designation of a special beneficiary superseded the general beneficiary provisions.

Plaintiff contends that the regulation does not require that special beneficiaries must always be dependents, etc. She says the term "must ordinarily" is intended to furnish a guide for the manager's discretion in approving a designation. The widow contends that since plaintiff is a "near relative" the regulation required payment to plaintiff in trust for the widow.

We think plaintiff's contention should be sustained. The term "must ordinarily" left room for the manager to exercise his discretion in exceptional cases. When the designation of plaintiff was approved in writing by the manager there was no limitation imposed in favor of the widow. Being a "near relative" did not disqualify plaintiff from being an exceptional designee. We cannot interpret the regulations so as to disqualify her where strangers would qualify.

The designation of plaintiff was subject to Peterson's designation of some one else before his death. He designated no one to supplant plaintiff. At his death, her interest in the benefits became vested. Modern Woodmen of America v. Parido, 335 Ill. 239, 242; Martin v. Stubbings, 126 Ill. 387, 404.

For the reasons given, the judgment is reversed and the cause is remanded with directions to enter judgment against the defendant-counterclaimant and in favor of the plaintiff-counterdefendant.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS TO ENTER JUDGMENT AGAINST DEFENDANT-COUNTERCLAIMANT AND IN FAVOR OF PLAINTIFF-COUNTERDEFENDANT.

LEWE AND FEINBERG, JJ. CONCUR.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A. D. 1952

General No. 9802 | Agenda No. 8

HARRY P. JOHNSON, et al., Plaintiffs-Appellees, vs. GREENFIELD FIRE PROTECTION DISTRICT, a body corporate and politic, Defendant-Appellant.	Appeal from County Court of Greene County

346 I.A. 464

O'Connor, P.J.

The plaintiffs successfully petitioned the County Court of Greene County for an order disconnecting an area of land from the Greenfield Fire Protection District. The district has brought this appeal.

The plaintiffs consist of forty-six property owners owning a total of about 5776 acres. Their suit was filed September 13, 1950. On December 22, 1950 the plaintiffs were granted leave to add nine (9) additional parties-plaintiff and on January 22, 1951 the court permitted two (2) additional parties to become plaintiffs. The Fire Protection District was organized by order of the County Court of Greene County August 7, 1950. The legality of the organization of the District is not in question.

The statute applicable to the disconnecting of an area from a Fire Protection District is as follows - Chap. 127½, Sec. 36, Ill. Rev. Stat., and states as follows:

"The owner or owners of record of any area of land consisting of one or more tracts, lying within the corporate limits of any fire protection district

STATE OF ILLINOIS
SUPREME COURT
THIRD DISTRICT

February Term, A. D. 1952

General No. 0802 Agenda No.

HENRY F. LAWSON, et al., Plaintiffs-appellees,	
vs.	Appeal from County Court of Greene County
GREENFIELD FIRE PROTECTION DISTRICT, a body corporate and politic, Defendant-appellant.	

O'Connor, P.J.

The plaintiffs in a duly petitioned the County Court of Greene County for an order disconnecting an area of land from the Greenfield Fire Protection District. The defendant has brought this appeal.

The plaintiffs owned of forty-six properties comprising a total of about 5776 acres. Their suit was filed on October 14, 1950. On December 22, 1950 the plaintiffs were granted leave to add one (1) additional petition-plaintiff and on January 2, 1951 the court permitted two (2) additional petitions to become plaintiffs. The Fire Protection District was organized by order of the County Court of Greene County August 7, 1950. The legality of the organization of the district is not in question.

The statute applicable to the disconnecting of an area from a Fire Protection District is as follows - Chap. 127, sec. 15, Ill. Ann. Stat., and states as follows:

"The owner or owners of record of any area of land consisting of one or more tracts, lying within the corporate limits of any fire protection district

organized after the effective date of this amendatory act, which (1) contains one hundred or more acres; (2) is located on the border of the fire protection district; and (3) which, if disconnected, will not result in the isolation of any part of the fire protection district from the remainder of the fire protection district, may have the area disconnected as follows:

"The owner or owners of record of any such area of land shall, within ninety days of the date of the order evidencing the organization of such fire protection district, file a petition in the county court in which the fire protection district was organized, alleging facts in support of the disconnection. The fire protection district from which disconnection is sought shall be made a defendant, and it, or any taxpayer, residing in that fire protection district, may appear and defend against the petition. If the court finds that the allegations of the petition are true and that the area of land is entitled to disconnection it shall order the specified land disconnected from the designated fire protection district, and such order shall relate back to the date of the order evidencing organization of said fire protection district."

It is the contention of the appellants that none of the above statutory requirements was met.

The title to the property was proved by the appellees without the calling of the plaintiffs to the stand. The fact they had not testified, in no way implies that they are not parties to the action and if the appellants believe that it was not the intention of any of these parties to join in this action, they could easily have proven the same by calling them as witnesses. It is further contended that the record does not contain facts that justify a finding that an area of land sought to be disconnected is located on the border of the district; but our examination of the plat furnished, does

indicate that the property involved is on the border of the district sufficiently so to make a substantial compliance with the statute.

Inspection of the territory sought to be disconnected as it is located on the plat considered with the roads as located, indicates that the disconnection of this area will not result in the isolation of any part of the fire protection district. No road is affected by this disconnection and each parcel of the remaining fire protection district is just as easily accessible after as it would be before disconnection.

All of the statutory provisions appear to have been clearly complied with, and the County Court of Greene County did not err in entering its order of disconnection, and the order of the County Court of Greene County is hereby affirmed.

Affirmed.

Abstract

2643

1A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A. D. 1952

346 I.A. 464

General No. 9803 Agenda No. 9

L. E. PEMBROOK et al.,
Plaintiffs-Appellees,

vs.

GREENFIELD FIRE PROTECTION DISTRICT, a body corporate and politic,
Defendant-Appellant.

Appeal from
County Court of
Greene County

O'Connor, P.J.

The plaintiffs successfully petitioned the County Court of Greene County for an order disconnecting an area of land from the Greenfield Fire Protection District. The district has brought this appeal.

The plaintiffs consist of fifty property owners owning a total of about 5644 acres. Their suit was filed September 16, 1950. On December 22, 1950 the plaintiffs were granted leave to add ten (10) additional parties-plaintiff and on January 23, 1951 the court permitted three (3) additional parties to become plaintiffs. The Fire Protection District was organized by order of the County Court of Greene County August 7, 1950. The legality of the organization of the District is not in question.

The statute applicable to the disconnecting of an area from a Fire Protection District is as follows - Chap. 127½, Sec. 36, Ill. Rev. Stat., and states as follows:

"The owner or owners of record of any area of land consisting of one or more tracts, lying within the corporate limits of any fire protection district

organized after the effective date of this amendatory act, which (1) contains one hundred or more acres; (2) is located on the border of the fire protection district; and (3) which, if disconnected, will not result in the isolation of any part of the fire protection district from the remainder of the fire protection district, may have the area disconnected as follows:

"The owner or owners of record of any such area of land shall, within ninety days of the date of the order evidencing the organization of such fire protection district, file a petition in the county court in which the fire protection district was organized, alleging facts in support of the disconnection. The fire protection district from which disconnection is sought shall be made a defendant, and it, or any taxpayer, residing in that fire protection district, may appear and defend against the petition. If the court finds that the allegations of the petition are true and that the area of land is entitled to disconnection it shall order the specified land disconnected from the designated fire protection district, and such order shall relate back to the date of the order evidencing organization of said fire protection district."

It is the contention of the appellants that none of the above statutory requirements was met.

The title to the property was proved by the appellees without the calling of the plaintiffs to the stand. The fact they had not testified, in no way implies that they are not parties to the action and if the appellants believe that it was not the intention of any of these parties to join in this action, they could easily have proven the same by calling them as witnesses. It is further contended that the record does not contain facts that justify a finding that an area of land sought to be disconnected is located on the border of the district; but our examination of the plat furnished, does

indicate that the property involved is on the border of the district sufficiently so to make a substantial compliance with the statute.

Inspection of the territory sought to be disconnected as it is located on the plat considered with the roads as located, indicates that the disconnection of this area will not result in the isolation of any part of the fire protection district. No road is affected by this disconnection and each parcel of the remaining fire protection district is just as easily accessible after as it would be before disconnection.

All of the statutory provisions appear to have been clearly complied with, and the County Court of Greene County did not err in entering its order of disconnection, and the order of the County Court of Greene County is hereby affirmed.

Affirmed.

Abstract only over clk/c of crt over phone. RS 2-7-52
Abs. in Full

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A. D. 1952

General No. 9814

Agenda No. 15

340 I.A. 465

WENDELL D. Z. REESE, a minor, by GUY F. REESE, his father and next friend, Plaintiff-Appellant,	Appeal from Circuit Court of Champaign County
vs.	
MARGARET LAYMON, Defendant-Appellee.	

O'Connor, P. J.

On December 3, 1949, Wendell D. Z. Reese, a minor, 19 years of age, was operating his motorcycle in a northerly direction on Prospect Street in the City of Champaign. The street runs northerly and southerly and intersects at right angles with University Avenue. Reese intended to cross University Avenue and continue northerly. The defendant, Margaret Laymon, was operating a motor vehicle in the opposite direction on Prospect Street, also approaching University Avenue where she intended to, and did, make a left turn. The vehicles came into collision while the defendant was negotiating the left turn, resulting in injury to Reese and damaging his motorcycle.

The plaintiff, by Guy F. Reese, his father and next friend, filed a complaint consisting of two counts. Count I alleges damages by reason of injury to the plaintiff, and Count II claims damages for injury to the motorcycle. The defendant filed an answer denying the material averments of the complaint and denied the right of the plaintiff to recover; and also filed with her answer a counter-claim to which the plaintiff filed an answer. No evidence was introduced to support the counter-claim, and

there is no issue before this court with reference to the counter-claim and answer thereto.

The case was tried by the court without a jury and resulted in a judgment for the defendant. The matter is being considered here on appeal.

There is practically no dispute as to the facts of the accident. It occurred at noon and with the pavement dry and the weather clear. The defendant was driving southerly on Prospect Street at a reasonable speed and with her flashing signal for left turn in operation. In the block north of University Avenue (where she intended to turn left) she saw some children standing on the southwest corner of University and Prospect. One child was her daughter and she tooted her horn in recognition of them. As she came closer to University Avenue, she slowed down as there was a car approaching her from the south. This car made a left turn in front of her. When she was sure of this left turn by this automobile, which was coming toward her, she turned easterly, or to her left. As the front of her car was almost even with the east curb of Prospect Street, according to her testimony, she collided with the motorcycle on which this plaintiff was riding and which apparently had been traveling in back of the car which had turned to the left in front of her. There is no positive proof as to the distance between this other car and the motorcycle.

The defendant saw the plaintiff and the motorcycle simultaneously with the crash. She testified that at the time of the impact, her car was in a diagonal direction in the northeast quarter of the intersection.

The plaintiff was traveling at a speed of from 10 to 20 miles per hour as he drove northerly in about the middle of the northbound lane of Prospect Street. He had entered the intersection when he saw the defendant's car for the first time. She was coming toward him going southeasterly. She

was turning in front of him. The plaintiff testified that the defendant's car traveled only a few feet from the time he first saw her until the collision. He traveled 7 to 10 feet. He applied his brakes but could not stop before the impact.

The plaintiff was not aware of the car that made the turn to the West in front of the defendant and did not see a westerly-bound car turn north on Prospect. Likewise, he did not see the girls on the corner. He was vague as to any traffic, except the defendant's car and only saw her car when she came into his lane of traffic. The failure of the plaintiff to see these vehicles and the children influenced the trial judge to conclude that the plaintiff "saw nothing" and, as a consequence, the court concluded that the plaintiff failed to prove that he was in the exercise of due care for his own safety, and should not be permitted to recover.

[1] The court properly concluded, and so stated in his opinion that negligence on the part of the defendant was proved by the greater weight of the evidence. The court concluded that the plaintiff's failure to be more observing made him guilty of contributory negligence.

The crux of this appeal narrows itself to the conduct of the plaintiff at and before the collision. We are confronted with the question of whether or not the failure of the plaintiff to see the motor vehicles at the intersection, which were not involved in the collision, and the failure to see the pedestrians on the sidewalk, and the failure to see the defendant until she came into his path, could amount to contributory negligence on the part of the plaintiff.

Except for the defendant's vehicle, the other traffic and the pedestrians at the scene of the accident were not involved in this collision. The motor vehicles, of which the plaintiff was unaware in his testimony, were

doing nothing out of the ordinary. There is no reason to believe that the plaintiff might have collided with any of them. He had a right to expect them to drive as they did. In the absence of one of these vehicles doing something unusual, or its position being such that it caused the plaintiff to vary his course or alter his speed or in some other way influence his driving, it can be understood that the plaintiff might not be aware of its presence and still not be guilty of contributory negligence. It is not uncommon for a careful driver not to recall passing traffic or landmarks which present no particular hazard to him.

The plaintiff saw the defendant when she entered his lane of traffic in the course of making a left turn. That is the type of driving the plaintiff could be expected to and did observe. This occurred suddenly and too late to avoid the collision.

At the time of this accident our Statute provided that the driver of a vehicle approaching an intersection with intent to make a left turn, must do so with caution and with due regard for traffic approaching from the opposite direction and the driver must not make a left turn until he can do so with safety. (Ill. Rev. Stats. Ch. 95½, Sec. 166) The plaintiff had the right to assume that the driver of a car approaching this intersection and intending to make a left turn in front of him into University Avenue, would comply with this requirement. Dees v. Moore, 335 Ill. App. 318; Fahrlander v. Mack, 341 Ill. App. 665.

[3-4] The failure on the part of the plaintiff to recall the other traffic, which in no way was involved in the collision, and the observing of the defendant's car when she commenced her left turn in front of him, in no way shows a lack of due care on the part of this plaintiff. We understand the question of contributory negligence is a question of fact to be

determined by the trial judge, but under the circumstances and the evidence in this case, the finding of the trial court that the plaintiff was guilty of contributory negligence and thus could not recover for his injuries and damages is not sustained by the evidence.

The judgment of the Circuit Court is, therefore, reversed and the cause remanded for a new trial.

Reversed and remanded.

determined by the trial judge. In view the circumstances and the evidence in this case, the finding of the trial court that the plaintiff was guilty of contributory negligence and thus could not recover for injuries or damages is not sustained by the evidence.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

2663

Abstract

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

FEBRUARY TERM, A. D. 1952

General No. 9774 Agenda No. 6

Herbert Cook and Virgil Staples, Plaintiffs-Appellants, vs. A. M. Weyant, Defendant-Appellee. A. M. Weyant, Counterclaimant-Appellee, vs. Herbert Cook, Counterdefendant-Appellant.	Appeal from the Circuit Court of Bureau County

Wheat, J.

This is an appeal in a personal injury action wherein Herbert Cook and Virgil Staples are plaintiffs-appellants and A. M. Weyant is defendant-appellee, in which case the jury found the issues in favor of the defendant, and the Court entered judgment accordingly. On a counterclaim filed by said A. M. Weyant against Herbert Cook, for property damage, the jury returned a verdict in favor of Weyant for $3,000.00, and upon the filing of a remittitur in the sum of $1,000.00, judgment was entered on the verdict for $2,000.00. Motions for judgment notwithstanding the verdict and for a new trial were denied, and this appeal follows.

The complaint alleged that plaintiff Cook was the owner and driver of a 1937 Ford automobile which was proceeding south-

erly, and that plaintiff Staples was a guest passenger; that defendant Weyant, proceeding northerly, negligently drove his 1938 Chevrolet automobile across the center line of the pavement and struck the car of Cook, causing bodily injuries to Cook and Staples, and damages to Cook's car. The counterclaim alleged that Weyant was driving his car northerly, towing a trailer which was carrying a midget racing automobile; that Cook's car crossed the center line of the pavement, struck and damaged the Chevrolet car, the trailer, and the midget racer.

As to the original suit the errors complained of relate solely to the jury's instructions; as to the suit on the counterclaim, error is assigned as to the admission of evidence, failure to direct a verdict and failure to instruct the jury on the subject of damages. An examination of the evidence indicates that the chief issue related to the question as to which car crossed the center line onto the wrong side of the pavement.

The instructions complained of are as follows:

Instruction No. 30:
"The Court instructs the jury that one who is voluntarily riding in an automobile is not relieved of the duty to exercise ordinary care and caution for his own safety, and if in considering the complaint of Virgil Staples, you find from the evidence said plaintiff was voluntarily riding in the automobile in question, and that he was not exercising ordinary care and caution for his own safety just before and at the time of the accident in question, and that such failure, if any, contributed to the injuries complained of by him, you should find the defendant Weyant not guilty as to the complaint of the plaintiff Virgil Staples."

Instruction No. 31:
"The Court instructs the jury that if either the plaintiff Cook or the plaintiff Staples has failed to show by the greater weight or preponderance of the evidence that he was using due care and caution for his own safety immediately prior to and at the time of the automobile collision, as a result of which he claims to have been injured and which is here in question, you should find the defendant Weyant not guilty as to the complaint of that plaintiff."

erly, and that plaintiff Staples was a guest passenger; that defendant Weyant, proceeding northerly, negligently drove his 1[illegible] Chevrolet automobile across the center line [illegible] a movement that struck the car of Cook, causing bodily injuries to Cook and Staples, and damages to Cook's car. The evidence tended [illegible] that Weyant was driving his car northerly, towards a trailer which was carrying a widget from automobile [illegible] Cook's car crossed the center line of the pavement, struck and damaged the Chevrolet car, the trailer, and the [illegible] posts.

As to the criminal suit the court [illegible] relied solely to the jury's instructions; as to the civil or the contributory claim, error is assigned as to the admission of evidence, failure to direct a verdict and failure to instruct the jury on the subject of damages. An examination of the evidence indicates that the court [illegible] relative to [illegible] to a [illegible] car crossed the center line into the [illegible] of the [illegible] accident.

The instructions complained of are as follows:

Instruction No. 30:

"The Court instructs the jury [illegible] the [illegible] voluntarily driving in an automobile [illegible] the duty to exercise ordinary care [illegible] for his own safety, and if in consideration [illegible] of Virgil Staples, you find from the evidence said plaintiff was voluntarily riding in the [illegible] in question, and that he was not exercising ordinary care and caution for his own safety, but [illegible] at the time of the accident in question, and that such failure, if any, contributed to the injuries complained of by him, you should find the defendant Weyant not guilty as to the complaint of the plaintiff Virgil Staples."

Instruction No. 31:

"The Court instructs the jury that if either the plaintiff Cook or the plaintiff Staples has failed to show by the greater weight of preponderance of the evidence that he was using due care and caution for his own safety immediately prior to and at the time of the automobile collision, as a result of which he claims to have been injured and which is here in question, you should find the defendant Weyant not guilty as to the complaint of that plaintiff."

Instruction No. 32:

"You are further instructed that under Counts 1 and 2 of the complaint filed herein, the burden is on each of the plaintiffs Cook and Staples to prove by the greater weight or preponderance of the evidence that he was in the exercise of due care and caution for his own safety at the time and place of the automobile collision as a result of which he claims to have been injured.

"You have no right to assume or take for granted, without such proof thereof, that either of the said plaintiffs was using such due care and caution at the time of such collision.

"For the plaintiffs to recover, the said plaintiffs must also show by the greater weight or preponderance of the evidence that the defendant Weyant was himself guilty of negligence which proximately caused the injuries they respectively complain of."

Instruction No. 35:

"The Court instructs the jury that if after you have heard and considered all the evidence in the case, the arguments of counsel, and the instructions of the Court as to the law, you are unable under your oaths to say whose negligence, if any, was the proximate cause of the injuries or damages sustained by the plaintiffs Cook and Staples, if any such injuries are shown by the evidence, then you should find the defendant Weyant not guilty as to all of the claims of the said plaintiffs Cook and Staples."

It is argued that Instruction 30 fails to confine the negligence to such negligence which proximately contributes to the injury; that Instructions 31 and 32 fail to confine the negligence of plaintiffs either to that which contributes or that which proximately contributes to the injury. It is first noted that these instructions do not use the term "contributory negligence" as argued, but rather the expressions "not exercising ordinary care and caution", "failed to show * * * that he was using due care and caution", and "using due care and caution". It is unnecessary to consider whether or not a distinction exists, as this objection is without merit for two reasons: first, a plaintiff must allege the use of due care in his complaint and then has the burden of proving it by the

evidence. These instructions do no more than set forth the plaintiffs' duty as to burden of proof and the consequences of such failure. Second, the plaintiffs themselves gave several instructions using substantially the same language. In plaintiffs' given Instruction No. 1 which defines the issues this language appears: "Further, the plaintiff Herbert Cook alleges * * * he was in the exercise of due care and cuation for his own safety and the safety of his property. * * * The plaintiff Virgil Staples alleges further that he * * * was in the exercise of due care and caution for his own safety." Plaintiff Staples' given Instruction No. 7 is as follows:

> "The plaintiff, Virgil Staples, may recover from the defendant, A. M. Weyant, if he proves as against the defendant, by a preponderance or greater weight of the evidence and under the instruction of the Court, each and all of the following elements:
> 1. That the plaintiff, Virgil Staples, just before and at the time of the occurrence in question, was <u>using reasonable care for his own safety.</u>
> 2. That the defendant, A. M. Weyant, was guilty of one or more of the negligent acts or negligent omissions charged in said plaintiff's complaint, and that one or more of such acts or omissions were the proximate cause of the occurrence in question.
> 3. That the plaintiff sustained the injuries or damages, or some portion thereof, if any, charged in plaintiff's complaint, and that such injuries or damages, if any, were proximately caused by such negligence, if any, of such defendant."

Instruction No. 8 referring to the plaintiff Herbert Cook is exactly the same as No. 7, except for the substitution of names, and after the words "using reasonable care for his own safety" the addition of the words "and that of his property." A party can not be heard to complain of an instruction when he has tendered one of like effect.

These instructions, Numbers 7, 8, 30, 31 and 32 are standard instructions and the giving of defendant's instruction Numbers 30, 31 and 32 was not error, and especially so as the

evidence. These instructions do not [illegible] the plaintiff's duty as to burden of proof and the [illegible] of such failure. Second, the plaintiff [illegible] instructions [illegible] substantially the same [illegible] tiff's given instruction 10. [illegible] begins to appear: "further, the plaintiff [illegible] * * * he was in the exercise of due care [illegible] own safety and the safety of his [illegible] virtual absolute silence [illegible] cite of the case [illegible] Stapler' [illegible]

> "the possibility [illegible] defendant, [illegible] the defendant, [illegible] the [illegible] of the [illegible] Court, [illegible] I. That the plaintiff [illegible] and is the [illegible] on, [illegible] II. That the defendant, [illegible] of care of [illegible] claims contained in said plaintiff's [illegible] such [illegible] or omission it also [illegible] proximate cause of the [illegible] 3. That the plaintiff [illegible] damage, [illegible] in plaintiff's complaint, [illegible] or omission, if any, were proximately caused by such negligence, if any, of such defendant."

Instruction No. 4 referred to the plaintiff [illegible] is exactly the same as No. 7, except for the [illegible] manner, as I after the words "in reasonable [illegible] safety" the addition of the words "and that of his property." A party can not be heard to complain [illegible] has tendered one of it's effect.

These instructions, Numbers 7, 8, 9, 11 and 12 are standard instructions and the giving of defendant's instructions Numbers 30, 31 and 32 was not error, and especially so as the

usual instruction was given that the instructions were to be considered as a series in connection with all other instructions bearing upon the same subject.

As to Instruction No. 35 it is argued that this is misleading in view of the fact that Cook, the driver, and Staples, the guest, were in different legal situations; that it suggests that Cook's negligence, if any, might be imputed to Staples; and that it suggests that if both Cook and Weyant were negligent and that the fault couldn't be singled out, then in such case the guest could not recover. This Court does not so construe the instruction. It does not refer to "both the negligence of Cook and Weyant" but refers to "whose negligence" which might be applicable to one or more than one of the parties. This is the standard instruction on guess and conjecture, and in simple language the jury is instructed that if they are unable to say whose negligence (either one or more of the parties) caused the injury, then the plaintiffs cannot recover. In addition to this the jury were further instructed by plaintiff Staples' given instruction No. 15 as follows:

> "The Court instructs the jury that if the plaintiff, Virgil Staples, proves by a preponderance or greater weight of the evidence, and under the instructions of the Court, that at the time of the occurrence in question he was a guest passenger riding in the vehicle of Herbert Cook, then under such circumstances the act or acts of the plaintiff, Herbert Cook, in driving his vehicle are not chargeable or imputed to the plaintiff Virgil Staples."

The giving of Instruction No. 35 did not constitute reversible error. This Court has read all of the instructions given the jury and taken as a series, feels that the jury could not have been misled. The issues were simple, and had the jury believed plaintiffs' version of the occurrence, they would have recovered.

usual instruction was given that the instructions were to be considered as a series in connection with all other instructions bearing upon the same subject.

As to instruction No. 13, it is argued that it is misleading in view of the [illegible], the [illegible], the jury, were in different legal relations [illegible] that book's negligence, if any, might be imputed [illegible] and that [illegible] and that the fault of [illegible] the place could not recover. This Court [illegible] the instruction. [illegible] "[illegible] and negligence" but [illegible] be applicable to one or more [illegible] the standard instruction [illegible] language the jury [illegible] whose negligence [illegible] injury, been the [illegible] the jury were further [illegible] instruction No. 13 as follows:

> "The Court instructs the jury [illegible] fully [illegible] by a [illegible] weight of the evidence, and under the [illegible] of the Court, [illegible] question [illegible] variable of [illegible], [illegible] absence the act [illegible] Good, in driving his [illegible] that [illegible] imputed to the plaintiff [illegible]."

The giving of instruction No. 13 did not constitute reversible error. This Court has read all of the instructions given the jury and taken as a series, while that the jury could not have been misled. The issues were simple, and had the jury believed plaintiffs' version of the occurrence, they would [illegible] recovered.

As to the counterclaim it is urged that the Court erred in the admission of evidence as to the lack of repairability of the midget racer; that the evidence shows that the racer could have been, and in fact was, repaired; and that the measure of damages should have been limited to the cost of repairs. Although a witness for counter-defendant Cook, one Chapulis, testified that he was a garage mechanic and was familiar with the repairing of racing cars, and that the racer could have been repaired, it appears that he made no examination of this racer after the occurrence, but testified that he had heard Weyant testify and that from such testimony he believed the midget racer could have been repaired, and could have been repaired in the shop of witness. As opposed to this, counterclaimant's witness Marshall, who was in the midget racing business and was familiar with this particular racer, testified that it would have no value until it was repaired and proved as a racing car; that speed and handling were the important things in a racing car, and not merely that the car could be operated. Weyant testified that the car could not be and was not repaired as a racing car. This presented a question of fact for the jury and it was not error to admit evidence as to the value of the car before the damage to it and the value afterwards. While it is true, as stated in Hardware Mutual Casulaty Co. v. Baldus, 316 Ill.App.283, that when personal property has been injured by the negligence of another and can be repaired, the proper measure of damages is the cost of the repairs, the converse is equally true that where the property cannot be repaired, the measure of damages is the difference between the fair cash market value before and after the injury. (McDonell v. Lake Erie & Western Ry. Co. 208 Ill.App.442). The evidence shows

that Weyant built this racer himself over a period of three and one-half years; that both the motor and the body had been specially rebuilt and re-constructed by him as a racing car; that after the damage to it, it was not possible to buy an assembled motor for a racing car; that he did thereafter re-construct the body and did install a standard motor but that the result was not a racing car as he had before; that it was sold to a disabled ex-service man who wanted to learn to drive and to use the car as a free pass to racing tracks. The selling price was $500.00. There was testimony that the value before the injury was between $2000.00 and $2500.00. In 169 A.L.R.1074, et seq., the rule as to damages appears to be substantially as follows:

> "If as often happens, repairs cannot restore the value of the automobile, it is obvious that if the plaintiff is to be fully compensated for the injury done him, his recovery must not be limited to the cost of the repairs made. In this situation it has been held that the measure of damages is the cost of repair plus the difference between the value of the car after the repair and its value before the injury, that is, the cost of repairs plus the amount of depreciation in value of the automobile as repaired."

There was sufficient evidence that the car could not be and was not repaired as a racer. Its maximum value was stated to have been $2500.00 before the injury and its salvage value $500.00. Upon remittitur the judgment of $2000.00 was not excessive. It was not error to admit the evidence complained of under the circumstances, as the question of repairability was one for the jury, nor was it error for the Court to refuse to direct a verdict. As to the failure of the Court to instruct the jury as to counter-claimant's measure of damages, the counter-defendant had the opportunity of tendering an instruction on the subject; not having done so he cannot now complain.

From an examination of the entire report of proceedings it appears that the plaintiffs had a fair trial; the issues were simple and the jury fairly instructed. The jury believed that Weyant was not negligent as to the charges in the complaint, which was consistent with their finding that Cook was negligent as to the charges in the counter-claim. Finding no reversible error the judgment of the Circuit Court is affirmed.

Affirmed.

From an examination of the entire record of proceedings, it appears that the plaintiffs had a fair trial; the issues were simple and the jury fairly instructed. The jury believed the evidence was not sufficient to be a charge [illegible] which was consistent with their finding [illegible] as to the owners in the [illegible]. Neither [illegible] error the judgment of the [illegible] court [illegible].

[illegible]

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

FEBRUARY TERM, A.D. 1952

General No. 9815 Agenda No. 16

Adran Wilson, as guardian of the estate of Ouida Frances Word, a minor, Plaintiff-Appellant, vs. Donald B. Esch, Defendant-Appellee.	Appeal from the Circuit Court of Champaign County

Wheat, J.

This is an appeal from a judgment of the Circuit Court of Champaign County, Illinois, in favor of defendant-appellee, based upon a jury's verdict of not guilty in a personal injury action arising out of the collision of two automobiles, wherein Adran Wilson, as guardian of the estate of Ouida Frances Word, a minor, is plaintiff-appellant, and Donald B. Esch is defendant-appellee.

The amended complaint was originally directed against Donald B. Esch, Leonard McAllister and Vernon U. Swaim as defendants, but at the close of plaintiff's case was dismissed as to McAllister and Swaim. It appears that during the course of the trial the latter two defendants made a settlement with plaintiff and received a covenant not to sue, the terms of which negotiations were made known to the jury, and the cause then proceeded to a conclusion with Esch as the remaining defendant.

APPELLATE COURT

General No. [illegible]

Adrian Wilson, as [illegible] of the estate of [illegible] Lorr, a minor,

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Appellees.

[illegible]

This is a [illegible] from a judgment of the [illegible] Court of Sangamon County, Illinois, [illegible] based upon a jury's verdict [illegible] motion [illegible] of the [illegible] Adrian Wilson, as [illegible] of the estate of [illegible], a minor, [illegible] appellees.

[illegible] was originally [illegible] Lorr, [illegible] and [illegible]. Owen as [illegible] defendants, but at the close of plaintiff's case [illegible] as to [illegible] and Owen. It appears [illegible] of the trial the latter two [illegible] made a [illegible] plaintiff and receive a [illegible] not to sue, [illegible] which negotiations were made known to the jury, [illegible] then proceeded to a conclusion with [illegible] the remaining defendant.

It appears that on January 4, 1950, the minor plaintiff, Ouida Frances Word, age thirteen, was seriously injured. She was a passenger in a car driven by her father, was sitting in the front seat, and between her father and a friend Peggy Towery who was holding a baby in her arms; in the rear seat were plaintiff's mother and another young child. The car, a 1941 Chevrolet, was then being driven by the father of plaintiff in a southerly direction on Route 45 north of Rantoul, Illinois, at about 4:30 P.M. The pavement was covered with ice and it was then raining and sleeting. A cinder road intersects Route 45 from the east a short distance north of the scene of the collision. The Plymouth car of defendant Esch had been parked headed west on the north side of this road from thirty to one hundred fifty feet east of Route 45 for several days because of some mechanical failure, and on the day in question its windows and windshield were covered with ice on the exterior except for a small peep-hole on the windshield. Esch had called Swaim's garage to send a tow-truck, which was dispatched, driven by Swaim's employee, McAllister. The Ford tow-truck got behind the stalled Esch car, pushed it onto the highway, and then southerly; as the Esch car, being pushed by the tow-car was fifty to one hundred fifty feet south of the intersection on the highway the rear end of the tow-truck was struck by the south bound car in which plaintiff was a passenger. There is a conflict in the testimony as to whether or not the car of Esch was moving or standing still at the moment of collision, but it appears that such conflict was sufficient to warrant that issue being submitted to the jury. It is charged that defendant Esch was guilty of negligence and wilful and wanton misconduct in the operation of his car and in the exercise of

his control over the operation of the tow-truck. By way of defense it is urged that the sole proximate cause of the injury to plaintiff was the conduct of the driver of the southbound car in which she was a passenger.

Among the assignments of error is the charge that plaintiff was unduly limited on redirect examination as to the witness Peggy Towery. On direct examination she testified that she was a passenger in the south bound car and that when she first saw the tow-truck it was stopped forty-nine feet ahead; on cross examination counsel produced a document signed by her but not offered in evidence, wherein she admitted that, isolated and out of context, the statement appeared that she saw the truck stopped when she was five hundred feet from it. She also denied on cross-examination that such was the fact. Plaintiff's attorney on re-direct examination attempted to show the circumstances surrounding the preparation and signature of the document but was denied the opportunity to do so. Likewise an offer of evidence to so prove was refused by the Court. The rulings of the Court constituted error. (Hirsch & Sons Iron Co. v. Coleman, 227 Ill.149,153).

During the argument to the jury as to the condition of permanent paralysis of plaintiff, counsel for defendant stated: "This little girl, the evidence showed, is in the Crippled Children's Hospital; and I think most of you know that she can continue there; and I think most of you know she does not even have to pay for that." An objection was made which was sustained by the Court and the jury was instructed to disregard it, and there was a reluctant and ambiguous withdrawal of the remarks by defendant's counsel. This argument by counsel for defendant

his counsel [illegible]

defence [illegible]

to plaintiff [illegible]

in which one [illegible]

[illegible]

Gill was [illegible]

mess Tengy [illegible]

and was [illegible]

client and the [illegible]

in close [illegible]

but the [illegible]

and out [illegible]

economic [illegible]

on cross-examination [illegible]

may be re-[illegible]

surrounding the [illegible]

was [illegible]

evidence [illegible]

the [illegible]

Lay [illegible]

During [illegible]

government [illegible]

"This [illegible]

children's [illegible]

combine there; and I think most of you [illegible]

have to pay [illegible]

by the Court and the jury was insufficient [illegible]

there was a [illegible] and [illegible] with [illegible]

by defendant's counsel. This argument by counsel [illegible] defendant

was improper and highly prejudicial. The fact that plaintiff's bills were being paid by others than the defendant had no place in the suit and defendant was not entitled to have any possible liability reduced in amount because of it. (Davidson v. Loomis, 282 Ill.App.515,519).

It is further argued that the Court gave to the jury four mandatory instructions, each ending with the peremptory direction to the jury that they find the defendant not guilty. Considered together these instructions added nothing to the knowledge of the jury as to the law but served merely as a source of confusion. The prejudice lies, not in the possible error of any one of these instructions but in the undue prominence and emphasis of the "not guilty" terminology in all of them; that is, the cumulative impact on the thinking of the jury created by the repetition of so many situations in which the defendant must be found not guilty. It may be suggested that the jury would be hard put to envisage a situation wherein defendant would be guilty. A defendant tenders a multitude of instructions, including many peremptory ones, at his own risk in the event the case is reviewed. Frequently, such instructions do not aid the jury but rather hinder them in the performance of their duty, which is to give each side a fair and impartial trial. (Chism v. Decatur Newspapers, Inc.340 Ill. App.42,48). In this connection it is noted that defendant's given instruction Number 33 was a peremptory instruction and told the jury that defendant was not required to exercise toward plaintiff the highest degree of care, but only ordinary care. This case did not involve a common carrier so that the standards of care were not involved. The giving of this instruction created an added confusion to the mental state of the jury, and may be

said to be analogous to one referring to a "mere" preponderance of the evidence, which was criticised in Gebhardt v. Village of LaGrange Park, 268 Ill.App.556,565, and to the instruction "if the evidence preponderates but slightly", which was criticised in Molloy v. Chicago Rapid Transit Co., 335 Ill.164,172.

A careful review of the entire report of proceedings, and the briefs of counsel, leads this Court to the inescapable conclusion that sufficient errors were committed on the trial of this case, which taken cumulatively, were prejudicial to the plaintiff, deprived her of that fair and impartial trial to which she was entitled, and constituted reversible error.

During the pendency of this appeal, defendant-appellee filed a motion to strike the abstract, or in the alternative to dismiss the appeal, or as a further alternative to tax the cost of the additional abstract to the appellant, which motion was ordered taken with the case. This Court concludes that the abstract furnished adequate basis for reversal and that the costs of the supplemental abstract should follow the case, by reason of which it is ordered that said motion be denied and that the costs of the abstract and supplemental abstract be taxed as costs in the case.

Additional errors assigned need not be discussed as upon a new trial these questions will probably not arise. By reason of the foregoing, the judgment of the Circuit Court is reversed and the cause is remanded for a new trial.

Reversed and remanded.

said to be analogous to one [illegible] in a [illegible] preponderance of the evidence, which was [illegible] in [illegible] v. [illegible] of [illegible] Ky., [illegible] Ill. App. 355, 361, in [illegible] the evidence [illegible] to [illegible] v. Chicago [illegible] Transit Co., [illegible] 172.

A careful review [illegible] the [illegible] the orders of [illegible], leads [illegible] conclusion that [illegible] were remanded [illegible] this case, which [illegible] quantity, were [illegible] plaintiff, deprived [illegible] and [illegible] for the [illegible] were [illegible].

During the pendency [illegible] filed a petition [illegible] dismiss the [illegible] of the [illegible] orders were [illegible] petition was [illegible] between [illegible] cause of [illegible] the [illegible] reason of which [illegible] the [illegible] taxed as costs in the [illegible].

Additional error [illegible] upon a new trial, these [illegible] by reason of the foregoing, the judgment [illegible] is reversed and the cause is remanded for a new trial.

Reversed and remanded.

184

45502

MARGARET DOERING and ALMA JURGENSEN, Appellants,	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	)	
EARL FRANKLYN WARNER et al., Appellees.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Appellees in their brief point out various violations by appellants of the rules of this court with respect to appeals. The points they make are as follows:

1. That no notice of appeal was served on Security Mutual Life Insurance Company, party defendant and mortgagee of the property in question.

2. That the complaint for partition was filed in the names of Margaret Doering, Alma Jurgensen and Walter Doering; that, thereafter, Walter A. Doering by petition averred that he had not authorized or retained appellants' attorney to represent him; that Margaret Doering was incompetent and not capable of entering into any agreement to retain a lawyer and had not retained a lawyer; that the suit was filed without the consent of either Walter A. Doering or Margaret Doering; that Walter A. Doering was dismissed as one of the plaintiffs and made a party defendant; that Margaret Doering was represented by a guardian ad litem who has not prosecuted an appeal on her behalf; that therefore the notice of appeal is not correct in stating that the appeal was taken by the plaintiffs aforesaid, nor is the appeal properly titled.

3. That the abstract of record does not include numerous matters necessary to be considered on appeal, among others: the decree from which the order of appeal is prosecuted; the order allowing fees to the trustee, from which there is also an appeal; the petition for fees, concerning which complaint is made; the wholly inadequate abstract of the pleadings; the master's report; the objections thereto, and the complete omission of all the testimony offered on behalf of defendants.

No reply was made to these charges of omissions and deficiencies. In fact, on oral argument they were expressly admitted.

Appellees urge that the appeal should be dismissed, and considering the numerous violations of the rules, we have concluded to sustain this motion.

Appeal dismissed.

Tuohy, P. J., and Robson, J., concur.

185

45512

THE PEOPLE OF THE STATE OF ILLINOIS ON THE RELATION OF THE STANDARD LIME & STONE COMPANY, a corporation, Relator, etc., Appellee,	) APPEAL FROM
v.	) SUPERIOR COURT,
	) COOK COUNTY.
VILLAGE OF McCOOK, WILLIAM E. KROLL, President of the Board of Trustees of the Village of McCook, JOHN CAPONE, Village Clerk of the Village of McCook, and TONY SNYDER, MICHAEL SIKICH, GEORGE WAGNER, JOHN CRNKOVICH, PHILLIP SVETICH and WILLIAM L. ALBERTSON, Trustees of said Village of McCook, Appellants.	)

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The relator, Standard Lime & Stone Company, operates a plant in the Village of McCook. It applied to the village for a building permit for an addition to the plant and was refused. Thereupon, this mandamus action was brought. It is agreed that all formal requirements for obtaining a permit were fulfilled. The sole issue presented to the trial court was the legal sufficiency of the amended answer, which alleged in substance that the existing plant as now operated constitutes a nuisance and the construction of an addition to the plant would augment that nuisance. The court below allowed a motion to strike the amended answer and ordered the writ to issue. The permit was issued in accordance with the writ and the building was completed and is now in operation.

A motion has been made to dismiss the appeal on the ground that the issue has become moot. This motion was taken with the briefs, and must now be allowed. No order entered by this court can have any effect on this controversy. The

permit cannot be revoked and this court cannot order the building demolished or removed. The village or its residents must proceed by complaint in equity or whatever other remedy may appear available to them to adjudicate the question of nuisance in the operation of the plant. It was urged on oral argument that a decision in this case is important, as it might be argued by the relator in other litigation concerning the matter that this case adjudicated the issue of nuisance against the village. We consider it clear that the sole issue decided by the trial court was that the village could not deny the building permit on the assumption that the contemplated use of the building would constitute a nuisance. It did not and could not in this proceeding pass upon the question as to whether the ultimate operation or use of the building would be a nuisance.

The case of Brownlow v. Schwartz, 261 U.S. 216, is directly in point. There, petitioner was seeking a writ of mandamus to compel the Commissioners of the District of Columbia to issue a building permit. The lower court refused the writ, but the court of appeals ordered it to issue and thereupon the permit was issued and the building completed. The Supreme court held that the case was moot since there was no remedy the court could provide. The involuntary nature of the action of the commissioners was held to be of no consequence since the action which was the sole matter in controversy had been completed. To the same effect is City of West University Place v. Martin et al., 132 Tex. 354, 123 S.W. 2d 638.

Defendants cite City of Miami et al. v. McCrory Stores Corporation et al., 181 Fed. 2d 368, 370, to support their contention that the issuance of a permit and completion of a building does not make a case moot. That was a suit for an injunction to restrain the enforcement of a building ordinance. The procedure followed in that jurisdiction, unlike the Illinois practice, permitted the court to award an injunction and also to order the issuance of a building permit. After the entry of the judgment and before the appeal a permit was issued pursuant to the order. A motion to dismiss the appeal was denied and the court went on to consider the propriety of the issuance of an injunction. In distinguishing the case of Brownlow v. Schwartz, 261 U.S. 216, the court accepted appellants' contention that there the controversy was over the issuance of a permit and did not involve the enforcement or validity of an ordinance; that while the decree (in City of Miami v. McCrory) did order the issuance of a permit, "* * * its prime and main provision was the one permanently enjoining the city from enforcing its ordinance." In rendering its decision the court said, "While the matter is not free from doubt, we are of the considered opinion that the controversy is not moot and that a decision by us on the merits is called for." That case is not authority for defendants' position. In Welton v. 40 East Oak Street Building Corporation, 70 Fed. 2d 377, cited by defendants, the court of appeals ordered a mandatory injunction to issue requiring the reconstruction of a building erected in violation of the zoning ordinance,. The issues in such

a case are different from that in the case now before this court. In the instant case the sole remedy obtainable was a writ compelling the issuance of a permit. After the permit was issued, both the issue and the remedy disappeared. The case is clearly moot.

Appeal dismissed.

Tuohy, P. J., and Robson, J., concur.

186

45444

WILLIAM C. MARTIN, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, a corporation, Appellee.	)	COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for personal injuries under the Federal Employers' Liability Act. A trial with a jury resulted in a verdict of not guilty, and judgment entered thereon on October 17, 1950.

On October 25, 1950, an order was entered extending the time within which plaintiff could file his motion for new trial "to" November 15, 1950. By stipulation of the parties, an order was entered on November 15 extending the time to file the motion for new trial "to" the 22nd day of November, 1950. The motion for new trial was filed November 22. Upon defendant's motion to strike the motion for new trial, the court on December 6, 1950, entered an order striking the motion for new trial, from which order, and judgment previously entered on the verdict, plaintiff appeals.

If the trial court correctly struck the motion for new trial, then the particular errors assigned in this court can not be considered because of the absence of a motion for new trial. Supreme Court Rule 22 provides:

> "Any party who fails to file a motion for new trial as herein provided shall be deemed to have waived the right to apply for a new trial."

Todd v. S. S. Kresge Co., 384 Ill. 524, 526.

Section 68 (1) of the Civil Practice Act (Ill. Rev. Stat. 1949, Ch. 110, par. 192) provides:

> " * * * and if either party may wish to move for a new trial or in arrest of judgment, or for a judgment notwithstanding the verdict, he shall, before final judgment be entered, or within ten days thereafter, or within such time as the court may allow on motion made within such ten days, by himself or counsel, file the points in writing, particularly specifying the grounds of such motion, * * *."

The time fixed for the filing of a motion for new trial is statutory, and the court has no power to extend the time except within the limits of the statutory authority. Schumacher v. Liesemeyer, 343 Ill. App. 455, 459.

We are confronted with the question whether an order extending the time for filing a motion for new trial "to" November 22nd includes or excludes the day of the 22nd.

In Taylorville Sanitary Dist. v. Nelson, 334 Ill. 510, 514, the court was called upon to construe the meaning of "to" in an order entered extending "time to file the bond 'to' November 14, 1927." The bond was filed November 14 and approved by the clerk of the court. It was there said:

> "The bond for appeal was not filed within the time allowed by the court. The right of appeal being purely statutory, the statute granting it must be strictly complied with. * * * The time for filing the appeal bond was not extended 'to and including' November 14, and the order was not that it be filed on or before a specified day, as such orders are sometimes made. As this court said in Stearns v. Sweet, 78 Ill. 446: 'Taking the word "to" in its

> plain, ordinary and popular sense, as we are in this instance required to construe it, it is clear the interest was paid only until or before the 26th inst.—that is, embracing the time which was completed when the 26th day commenced.' The question involved was whether interest had been paid, operating as an extension of time, to the detriment of the sureties. The credit on each note read: 'Interest paid on the within note to July 26,'71.' In Webster v. French, 12 Ill. 302, a statute required that 'bids shall be received until the first day of July, 1849, at which time the bids shall be opened.' It was held that the word 'until' was a word of exclusion and excluded the right to receive bids after June 30. It was said: 'Before the first of July and until the first of July convey nearly, if not precisely, the same meaning.' By way of re-enforcement of the argument Judge Caton said that bids were invited until a given time but after that time none were authorized. Had no bids been filed before the first day of July the power of the Governor to sell would have been gone. All bids were required to be in before that time. In Clark v. Ewing, 87 Ill. 344, time to plead was extended by order of court to the third Monday of July. Default for want of a plea was entered on that day, damages assessed and final judgment rendered. It was held to that day must be construed to mean, for the purpose of pleading, until the meeting of the court on that day, and that it did not include the whole of the day."

In Brandenburg v. Buda Co., 299 Ill. 133, 137, in construing the meaning of the word "to" in a contract, the court said:

> "It is true, ordinarily, that where a contract simply provides that it is to extend to a certain date, the word 'to,' as contended by appellant, means until, and excludes the date following it."

It is clear to us that if in the matter of contract "to" is to exclude the date following the word, then, in the computation of statutory time the meaning of "to" will not be enlarged.

Since the errors assigned are not properly preserved by a motion for new trial, as required by statute, we are compelled to affirm the judgment.

JUDGMENT AFFIRMED.

KILEY, P.J., AND LEWE, J., CONCUR.

187

45506

E. A. GARDNER, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
HELEN KOHS, Appellant.	)	OF CHICAGO.

343 I.A. 468

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying her petition in the nature of a writ of audita querela in an action of forcible detainer brought by plaintiff against defendant in the Municipal Court of Chicago. Judgment for possession had been entered April 21, 1950, a certificate of eviction having been previously obtained by plaintiff, as required by the Federal Housing and Rent Act. The petition, filed February 6, 1951, alleged that on August 7, 1950, the Federal Housing Administrator revoked the certificate of eviction, and that plaintiff accepted rent from defendant through December 31, 1950.

The petition was heard February 16, 1951, and the only evidence offered by defendant in support of said petition was that plaintiff had accepted rent from the defendant since the entry of the judgment and through December 31, 1950. The court denied the petition. The writ of restitution had been stayed to December 31, 1950, under an order of court, which provided: "Plaintiff given leave to accept rent without prejudice during occupancy by defendant under stay of writ aforesaid." Defendant accepted

the benefits of the stay and paid rent under such order.

It has been held that the acceptance of rent, under such circumstances, does not create a new tenancy and does not void the judgment for possession. Parradee v. Blinski, 342 Ill. App. 292; Nelson v. Berry, 330 Ill. App. 244; Goroway v. Shelby, 331 Ill. App. 181.

The ancient common law writ of audita querela was intended to afford relief from the consequences of a judgment or an execution on the ground of some matter of defense or discharge arising subsequent to the rendition of the judgment or the issuance of the execution. It is the proper remedy to invoke to avoid an execution which has been sued out after the judgment has been released, paid or satisfied on a prior execution, or where any other matter has occurred which operated as a discharge of the judgment. 7 C. J. S. Audita querela, §2; Nelson v. Berry, supra.

Neither the petition nor the evidence was sufficient to permit the relief sought under the writ of audita querela.

The order of the Municipal Court is affirmed.

AFFIRMED.

KILEY, P.J., AND LEWE, J., CONCUR

346 I.A. 469

45631

PEOPLE OF THE STATE OF ILLINOIS, on relation of LEO SLUTZKIN, Appellee,	APPEAL FROM
v.	CIRCUIT COURT,
VILLAGE OF LINCOLNWOOD, a municipal corporation, Appellant.	COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The respondent, Village of Lincolnwood, a municipal corporation, appeals from a judgment in a mandamus action commanding it to issue a license to the petitioner, Leo Slutzkin, to sell food to the general public on premises located at the southwest corner of Lincoln and Crawford avenues in the village, to permit him to erect advertising display signs, furnish him with a water supply and water meter, and to permit a public service company to furnish him with electricity and heating gas.

From the pleadings and evidence adduced upon the hearing it appears that on April 3, 1951 Leo Slutzkin, petitioner, entered into a five-year lease of the property located at 6750 Lincoln avenue in the village, to be used chiefly as a sales outlet for French fried shrimp and smoked fish. The property, consisting of approximately one acre, was improved with a one-story frame building with kitchen, front and side entrances. On May 2, 1951 petitioner wrote the village the following letter:

"Please consider this a request for a license to open up a Seafood Establishment at 6750 Lincoln Avenue,

the Southwest corner of Lincoln and Crawford, in Lincolnwood. This sales outlet will be chiefly french fried shrimp, and smoked fish. Most of the processing of fish will be done in our Chicago Plant.

"Before we open for business, we will of course level up that gutted hole on the property, we will clean up the place, paint the building, put in new electrical wiring throughout, install toilet facilities, wash basins with hot and cold running water.

"We will obey all local and State ordinances."

The village has three ordinances applicable to establishments engaged in selling food to the general public; one governing restaurants where food is served for consumption on the premises; another governing food purveyors, i.e., operators of establishments where food is not served for consumption on the premises; and the third, a general building ordinance pertaining to the erection or alteration of buildings. The restaurant ordinance contains a provision that "before any person or persons, firm or corporation shall be allowed to operate a restaurant * * *, they shall procure from the Village Clerk a permit so to do and pay" the license fee therefor; also "that it shall be the duty of every keeper of a restaurant at all times to keep the premises * * * in a clean, hygienic and sanitary condition"; and it imposes on the members of the Board of Health the duty to inspect the premises to ascertain whether all ordinances and State laws relative to the keeping of restaurants are being complied with, and to cause all such ordinances and statutes to be

strictly enforced. The food-purveyor ordinance contains like provisions, and requires written application for a license to be made on forms supplied by the village clerk, properly filled out and filed with him. "Such application shall contain the name and address of the applicant * * * and such further information as may be required by the Board of Health, in order to inform them fully as to the size and nature of the place to be used for the purpose of the business, and the condition, equipment and facilities for conducting the business therein, the health of persons in the employ and the regulations and facilities provided for them." One section of the ordinance requires all purveyors of meats or other perishable products to be equipped with at least one refrigerator or cooling room of adequate size and capacity so as to permit, at all times, free circulation of air therein and so as to maintain a temperature of forty-two degrees Fahrenheit, or lower. The building ordinance provides that "no building or structure * * * shall be erected, constructed, altered or repaired without a permit therefor, * * *. No permit shall be issued except with the approval of the building inspector * * *. Before the erection, construction, alteration or repair of any building or structure * * * for which a permit is required * * *, the owner, architect or builder shall submit in duplicate to the Commissioner of Buildings at his office full specifications and plans of the proposed construction, alteration, or repairs, and file a detailed statement thereof in writing under oath. * * * If * * * it shall appear to said commissioner that the manner

of erection, character of construction and kind of material are in accordance with the ordinances of said Village," he shall "approve a permit to make such construction or alteration, and it shall not be lawful to proceed to construct, alter or repair any building * * * without first obtaining said permit. The fees * * * shall be paid at the time of making the application for a permit * * *."

Petitioner's letter was delivered to the village clerk, and petitioner thereafter repeatedly telephoned the clerk with reference to securing the license requested in the letter. Slutzkin readily conceded that the "stand," as he referred to it, would have to be remodeled, but the clerk pointed out that the letter would not serve as a formal application for a license inasmuch as it was necessary to submit plans and specifications under the building code which in turn would have to be approved by the building commissioner and the village board before the village clerk could issue a license for petitioner to sell food to the general public. Slutzkin took the position that he did not have to conform with such requirements, and he did not in fact submit any plans or specifications. No license was issued.

June 1, 1951, petitioner filed his action for mandamus to coerce the village to issue him a license, and thereafter numerous pleadings were filed by both parties. The cause subsequently proceeded to trial, and at the conclusion of the hearing the court ordered the writ of mandamus to issue.

Respondent takes the position that the petitioner has no right to a license to operate a seafood establishment and sell food to be consumed on or off the premises without complying with the village ordinances governing the issuance of licenses to sell food, as well as those governing the repair and alteration of buildings; that on the face of the pleadings and under the evidence petitioner is not entitled to a license, and the village officials would be derelict in their duty if they issued him one; that the premises on which the petitioner seeks to operate an outlet for the sale of seafood are not safe and sanitary; and that the submission of plans and specifications are a condition precedent to the issuance of a license to assist the village officials in determining whether the building is safe and sanitary.

Since acquiring the lease and making the letter request for a license, petitioner has made repairs at a cost of approximately $2000.00; he has "made whatever repairs * * * were necessary," he states in his brief. But none of the work was done under permission given or specifications approved by the official authorities, as required by the ordinances, and there is no evidence that health and safety regulations required by the ordinances were complied with. Donald J. Whalen, superintendent of the water department and building inspector of the village, testified that he had inspected the interior of the building in April of 1951 and that at that time it was of hollow-shell construction; and that, pursuant to instruction by the court on June 20, 1951, he made a further inspection of the premises, and found that

the structure was wholly out of alignment with reference to the joists, a condition obvious to the naked eye; that the walls were of frame construction, with wallboard on the inside; that there was no water supply in the building; and that he had received no formal request for water service. He explained that all consumers of water in the village receive water through meter service, and that in order to obtain a water supply a prospective consumer must submit plans and specifications for his structure, and, if found satisfactory, a meter vault and water meter are then installed by a bonded and licensed plumber and service installed in the building; and he stated that he could not install a water supply until he obtained explicit authority from the village clerk.

There is no plausible explanation of record for petitioner's refusal to comply with the formalities prescribed by the ordinances of the village for obtaining the license requisite for conducting a food establishment on the premises. When the letter was transmitted to the clerk, petitioner was advised that an application would have to be made and submitted for approval of the village authorities. The village clerk testified that he refused to issue the license because no plans and specifications had been submitted, as required, and he did not think the building was safe or sanitary since it was of frame construction, sagged and leaned over, and was adjacent to a building that had been condemned and torn down; also, that he did not consider the request for a water supply and water meter, or for a permit for the public service company to furnish him

with electricity and heating gas, because petitioner did not have a license. Moreover, at the time the letter request was made, the premises were not safe because of the gutted hole on the property which could very well constitute an attractive nuisance.

Under section 23-1, chapter 24, Illinois Revised Statutes 1951, the authorities of a municipality have the powers enumerated in sections 23-2 to 23-111, which include the right to make all regulations necessary or expedient for the promotion of health or the suppression of disease. The health power is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporation. Gundling v. City of Chicago, 176 Ill. 340; Cleaners Guild of Chicago v. City of Chicago, 312 Ill. App. 102. "Police power is hardly susceptible of exact definition. When the city council considers some occupation or thing dangerous to the health of the community and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation. Municipalities are allowed a greater degree of liberty of legislation in this direction than in any other. * * * The most important of the police powers is that of caring for the safety and health of the community." Biffer v. City of Chicago, 278 Ill. 562.

Petitioner evidently proceeded on the theory that he, rather than the authorities, should be the judge as to the nature and extent of the repairs and alterations necessary

for health and safety purposes, as contemplated by the ordinances, and that a formal application for a license and the approval of plans by the village authorities as a condition precedent to the issuance of a license, were unnecessary. The letter request for a license shows, on its face, that a defective building, sanitation and safety conditions existed; and even if the letter were to be considered as an application, as petitioner contends it should be, he would not in any event have been entitled to a license until all the repairs and alterations which he claims to have made, without consulting the authorities, were effected; even then there is a possibility that the building as altered would not meet the ordinance requirements. Under the established rule in this State, the writ of mandamus will be awarded only in cases where the petitioner shows a clear right to it and a clear neglect of duty on the part of defendant to perform the act sought to be ordered; and in such cases, before the writ will issue, petitioner must show a compliance with all valid requirements of the applicable ordinance. People ex rel. Younger v. City of Chicago, 280 Ill. 576. "A peremptory writ of mandamus will not be issued until the right to it be clear." Harrison v. People, 101 Ill. App. 224.

There is considerable force to respondent's further contention that petitioner's action cannot be maintained because none of the officers of the village were made parties respondent. It is elementary that a municipality can act only through its officers (People V. Dixon, 346 Ill. 454); however, in view of our conclusions as to the merits

of the case, it will be unnecessary to discuss this point further.

Upon the showing made, petitioner had no clear right to a license to operate a seafood establishment and sell food for consumption either on or off the premises, without first complying with the village ordinances; and therefore the judgment in mandamus should not have been issued. Accordingly, judgment of the Circuit Court is reversed.

JUDGMENT REVERSED.

Burke, P. J., and Niemeyer, J., Concur.

192

45697

AUGUSTUS L. WILLIAMS, Appellant, v. METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order of the Municipal Court vacating and setting aside a judgment previously entered in his favor against the defendant insurance company in the sum of $315.00. In the suit filed August 31, 1950, plaintiff sought damages for losses alleged to have been sustained by him within the provisions of a disability insurance policy issued by defendant. Summons issued and was made returnable September 11, 1950. On that day defendant filed its appearance, and subsequently its motion to strike the statement of claim. On October 11, 1950 the case was set for trial January 19, 1951, and on that date continued to February 2, 1951 because the motion to strike the statement of claim was undisposed of. When the matter was reached on February 2, 1951 before Judge Kula in Room 921 of the Municipal Court, defendant's motion to strike had still not been disposed of, and therefore the trial was contined to May 11, 1951. The minute clerk in that room entered the date for trial as May 11, 1951 in his Minute Book, but because he did not have the file in this case before him, the date was not entered on the Half Sheet,

[illegible]

[illegible] E. [illegible],
Appellant,

v.

[illegible] CORPORATION OF [illegible], a corporation,
Appellee.

[illegible]

[illegible]

[illegible]

which is part of the file. Plaintiff was personally present in Room 921, and defendant was represented by counsel when continuance of the trial to May 11, 1951 was ordered by the judge.

On February 7, 1951 defendant's motion to strike the statement of claim was sustained, and plaintiff was given leave to file an amended statement of claim within ten days, and at the same time defendant had leave to plead within ten days thereafter. On February 16, 1951 plaintiff filed his amended statement of claim. By stipulation of the parties, defendant's time to plead thereto was extended to March 14, 1951. On the latter date, defendant filed its motion to strike the amended statement of claim in the office of the clerk of the Municipal Court. The motion was stamped and filed, but again it was not entered on the Half Sheet in the file.

On April 10, 1951 the case appeared on the trial call in Room 921, without knowledge on the part of defendant or its attorney, and without either of them being present. Because defendant's motion to strike the amended statement of claim did not appear on the Half Sheet, evidently due to the failure or omission of the clerk to properly record the filing of the motion, the court entered an order defaulting defendant for failure to file a defense, and rendered judgment against it because of the alleged default in the amount of $315.00. On that date defendant's motion to strike was still in the files and was pending and undisposed of.

On May 11, 1951 the case, for the second time, appeared on the trial call in Room 921. Defendant's counsel appeared, and the case was called for trial. It was then that defendant learned, for the first time, that default and judgment had been entered against it on April 10, 1951. Defendant thereupon filed its verified petition to vacate and set aside the judgment, and on May 17, 1951, after hearing argument by plaintiff and counsel for defendant, the court vacated the order of default and judgment, and set the case for trial. Plaintiff appeals from that order.

In the order vacating the default and judgment the court found that at the time it was entered "there was on file and undisposed of the written motion of said defendant to strike plaintiff's Amended Statement of Claim," that "said motion to strike * * * had never been set for a hearing, nor had said motion ever been passed upon by this Court," that "said case was set for trial on May 11, 1951," that the case "appeared upon the trial call of May 11, 1951 in this Court," that the case "had heretofore on April 10, 1951, through inadvertence or mistake, on the part of the clerk of this Court * * * wrongfully been placed on the trial call for April 10, 1951," and that "said order of default * * * and said judgment for $315.00 were wrongfully entered * * * without fault or negligence of said defendant or its attorneys."

On June 1, 1951 plaintiff filed a motion and affidavit to set aside the order of May 17, 1951, to which defendant filed an answer asserting a good and meritorious defense based

on payment, release and satisfaction. On July 19, 1951 Judge Slater of the Municipal Court overruled plaintiff's motion, to which exception was taken and from which he appeals.

Defendant's petition to vacate the judgment does not disclose any error of fact not appearing upon the face of the record; it does, however, set forth "grounds for vacating, setting aside or modifying the same [the judgment], which would be sufficient to cause the same to be vacated, set aside or modified by a suit in equity." (Ill. Rev. Stat. 1951, ch. 37, sec. 376.) The cause was not at issue when the judgment was entered; defendant's motion to strike the amended complaint was still undisposed of. Defendant's counsel were diligent throughout the proceedings, and, as the court found, "without fault or negligence." Undoubtedly the inadvertence or mistake of the clerk in placing the case on the trial call for April 10, 1951 caused the wrongful entry of the judgment. Under the circumstances it would be unconscionable to permit the judgment to stand.

The order of the Municipal Court is affirmed.

ORDER AFFIRMED.

Burke, P. J., and Niemeyer, J., Concur.

45549

LELA J. RUSPANTINI, Executrix of the Estate of ITALO RUSPANTINI, Deceased,
Appellant,

v.

SAMUEL STEFFEK,
Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Appellant, executrix of the estate of her deceased husband (hereinafter called decedent), appeals from a judgment for $10,000 entered against her on a counterclaim for damages resulting from personal injuries sustained in a collision between the automobiles of counterclaimant and decedent.

The principal suit was instituted to recover damages for the wrongful death of decedent. The defendant therein filed a counterclaim against the original plaintiff and the Indiana Harbor Belt Railroad Company for injuries sustained by him in the collision. The original suit and the counterclaim against the railroad company were dismissed, leaving a single action for personal injuries under the counterclaim. The parties will be designated plaintiff and defendant.

The collision occurred after midnight December 20, 1947 on Halsted street near 140th street on an overpass crossing the tracks of the Indiana Harbor Belt Railroad Company south of the City of Chicago. The street and overpass were paved with asphalt. The night was cold and frosty and the pavement slippery. Plaintiff charges and defendant admits

that he was driving south and decedent was driving north. There were no eyewitnesses to the collision except the drivers of the two cars. Decedent died immediately after the accident. Witnesses who arrived a few minutes later testified that the cars were standing on the west side of the pavement on the down-grade or south half of the overpass; that there were skid marks 60 or 70 feet long extending from the northbound lane onto the southbound lane to within a few feet of plaintiff's car. No one testified to looking for or seeing tire marks north of the cars. There was no evidence as to plaintiff's habits of care, caution, sobriety or industry, and nothing to show where or how he had spent the evening or as to his condition of sobriety immediately before or after the collision. The record (not the abstract) shows that defendant's objection to the competency of plaintiff to testify as to where he had been on the evening of the collision, was followed by a conference in chambers. Nothing further is shown. The plaintiff was not examined further as to his conduct that evening or anything relating to the collision. At the close of plaintiff's evidence defendant's motion for a directed verdict was denied. She offered no testimony. She made a second motion for a directed verdict on which the court reserved its ruling. Defendant's motion for judgment notwithstanding the verdict was denied. She appealed.

The first point raised by defendant is that there is no evidence tending to prove that plaintiff exercised reasonable care for his own safety. Plaintiff, the only surviving

occurrence witness, is barred by section 2 of the Evidence Act from testifying because defendant is sued as executrix. Neither plaintiff nor defendant stressed that fact. Reversing their position in the trial court, defendant's counsel assumed on appeal that plaintiff was competent to testify as to the facts of the collision. They say, "The plaintiff, Steffek, was not asked to describe the circumstances" of the collision. Plaintiff's counsel refer only incidentally to the bar of "the 'Dead Man's'statute." The court, overlooking the capacity in which defendant was sued, erroneously drew unfavorable inferences because of plaintiff's failure to testify as to the facts and circumstances of the collision. Plaintiff employed additional counsel and our oversight was pointed out in a petition for rehearing in which defendant's objections to the competency of plaintiff as a witness to the collision was first brought to our attention. Defendant did not abstract these objections. A rehearing was granted. Defendant filed her answer. The case was argued orally.

Plaintiff must show affirmatively that at and immediately prior to the time of the accident he was in the exercise of reasonable care for his own safety. Dee v. City of Peru, 343 Ill. 36; Prill v. City of Chicago, 317 Ill. App. 202. Where there are no eyewitnesses to the occurrence competent to testify, such care cannot be shown by direct evidence. It must then be shown by proof of habits of the injured or deceased person and by facts and circumstances from which an inference of reasonable care arises. As said in Newell v. C. C. C. & St. L. Ry. Co., 261 Ill. 505, 508:

> "The allegation in the declaration that the deceased was in the exercise of due care and caution for his own safety at the time of the accident was a necessary and material allegation and must be proven. As there were no eye-witnesses to the occurrence this allegation could not be proven by any direct testimony, but it still devolved upon defendant in error to establish the exercise of ordinary care on the part of her intestate by the highest proof of which the case is capable. (Collison v. Illinois Central Railroad Co. 239 Ill. 532; Stollery v. Cicero Street Railway Co. 243 id 290.)"

After discussing and quoting from the two cases cited, the court said:

> "Under this rule a plaintiff is not permitted, in cases where there are no eye-witnesses, to merely prove the accident which resulted in death and then rely upon the instinct of self-preservation common to all men to establish the exercise of due care and caution on the part of the deceased. It is incumbent upon the plaintiff in such a case to prove the habits of the deceased as to sobriety, as to prudence and the exercise of care and caution in the ordinary affairs of life, and as to any other particular that would tend to throw light upon the question of whether, at the time of the fatality, he was likely to have been in the exercise of ordinary care. In the absence of any proof whatever which would tend to show that the deceased was in the exercise of ordinary care for his own safety, the defendant in error was not entitled to recover. The peremptory instruction asked for should have been given upon this ground."

In Anderson v. Chicago, R. I. & P. Ry. Co., 243 Ill. App. 337, the court stated the rule as follows:

> "The exercise of due care by the deceased must be established by the highest proof of which the case is capable. Collison v. Illinois Cent. R. Co., 239 Ill. 532; Illinois Cent. R. Co. v. Nowicki, 148 Ill. 29; Chicago & A. Ry. Co. v. Carey, 115 Ill. 115; Missouri Furnace Co. v. Abend, 107 Ill. 44. Appellee offered evidence to show that the deceased was sober when he left the house; that he sometimes drank a glass of whiskey but he was always sober, and was never known to get drunk; that he always worked; that he worked for the Illinois Zinc Company for 30 years and for the appellant as a section hand for five years, and

> was in possession of all of his faculties. Appellee insists that this evidence was sufficient to establish that the deceased was in the exercise of due care, and in support of this contention cites Missouri Furnace v. Abend, 107 Ill. 44; Chicago R. I. & P.R. C.v.Clark, 108 Ill. 113; Toledo St. L. & K. C. R. Co. v. Bailey, 145 Ill. 159; Chicago, B. & Q. R. C. v. Gunderson, 174 Ill. 495; Cleveland C. C. & St. L. Ry. Co. v. Keenan, 190 Ill. 217; Chicago & A. R. Co., v. Wilson, 225 Ill. 50; Moore v. Bloomington, D. & C. R. Co., 295 Ill. 63. Upon examination it will be found that none of these cases support this contention. In each of them there was evidence, either direct or circumstantial, that the deceased was a careful, prudent man. The law recognizes the fact that there are persons who are careless, heedless and inattentive, as well as those who are careful and prudent. Collison v. Illinois Cent. R. Co., supra."

So, in Roadruck v. Schultz, 333 Ill. App. 476, cited by plaintiff, it was shown that the deceased truck driver, plaintiff's intestate, was about 49 years of age, temperate, in good health, possessed of all his faculties and reputed to be a cautious and competent driver. In Hann v. Brooks, 331 Ill. App. 535, first cited in the petition for rehearing, it was shown that plaintiff's intestate was a sober, strong and healthy man, a careful and safe driver who at all times observed the rules of the road and drove at a safe rate of speed. Although the trial court sustained a motion to strike this evidence, it does not appear that the jury were instructed to disregard the testimony. The report of proceedings discloses that the ruling was made out of the presence of the jury. The ruling of the trial court was held to be erroneous. The judgment for plaintiff was sustained because the serious errors shown by the record were committed by the defendants or were in their favor. In this case there is no evidence of the health or habits of plaintiff creating

a presumption of due care. Plaintiff is forced to rely solely on the circumstances showing or tending to show that the collision occurred in the lane for southbound traffic and that consequently plaintiff was where he had a right to be when the automobiles collided. Due care by plaintiff is a question wholly independent of the negligence of defendant. Prill v. City of Chicago, supra. No inference as to speed of the automobile, the sobriety or vigilance of the driver can be drawn from the fact the automobile is in the proper driving lane. Proof of habits of care and caution would create an inference of reasonable speed, sobriety and watchfulness, and tend to prove due care. No evidence tending to prove these facts was offered. There being no evidence tending to establish due care by plaintiff, the trial court should have directed a verdict for defendant or entered judgment for her notwithstanding the verdict. This conclusion makes it unnecessary to consider other points raised and argued by defendant.

The judgment is reversed.

REVERSED.

Burke, P. J., and Friend, J., Concur.

Case No. 139

Lela J. Ruspantini, Executrix of Estate of Italo Ruspantini, Deceased, Appellant, v. Samuel Steffek, Appellee.

Gen. No. 45,549.

1. AUTOMOBILES AND MOTOR VEHICLES, § 102.1 *—*plaintiff's burden of proof.* Plaintiff in automobile accident case was bound to prove not only that defendant's intestate was guilty of negligence but that plaintiff was in exercise of due care for his own safety.

2. AUTOMOBILES AND MOTOR VEHICLES, § 124 *—*circumstantial evidence.* It is only in absence of eyewitnesses to accident that plaintiff may rely on inferences drawn from circumstantial evidence and habits of care and caution to prove exercise of due care by plaintiff for his own safety.

3. AUTOMOBILES AND MOTOR VEHICLES, § 143.1 *—*propriety of directing verdict.* Where plaintiff in automobile accident case appeared as a witness and testified as to his ownership of automobile and ill health following collision but failed to produce any testimony showing exercise of due care on his part, and no reason appeared of record why plaintiff was not examined as to circumstances of collision and his conduct immediately before collision, court was bound to presume that plaintiff's testimony as to circumstances of collision would have been unfavorable to him; hence trial court should have directed a verdict for defendant or, after verdict for plaintiff, entered judgment for defendant notwithstanding verdict.

4. EVIDENCE, § 89 *—*presumptions.* Where testimony within control of a party is not produced, a presumption arises that such testimony would be unfavorable to such party.

Appeal by plaintiff from the Superior Court of Cook County; the Hon. GEORGE M. FISHER, Judge, presiding. Heard in the first division of this court for the first district at the October term, 1951. Reversed. Opinion filed February 11, 1952.

BURT A. CROWE, of Chicago, for appellant; CARL E. ABRAHAMSON, of Chicago, of counsel.

PHILIP E. RYAN, and THOMAS C. HOLLYWOOD, both of Chicago, for appellee; PHILIP E. RYAN, of Chicago, of counsel.

MR. JUSTICE NIEMEYER delivered the opinion of the court.

Defendant to a counterclaim filed in her original action against counterclaimant, appeals from a judgment of $10,000 entered on the counterclaim for damages arising out of personal injuries sustained in a collision between the automobiles of counterclaimant and counterdefendant's intestate.

Counterdefendant, hereinafter called defendant, originally brought suit against counterclaimant, hereinafter called plaintiff, for damages arising out of the death of her intestate as a result of the collision. This action was dismissed and a trial was had on the counterclaim. The collision occurred about midnight December 20, 1947, on Halsted street at an overpass over the tracks of the Indiana Harbor Belt Railroad Company in Chicago. Plaintiff was driving south. Defendant's intestate was driving north. The street was paved with blacktop asphalt. The night was cold and frosty and the pavement slippery. There were no eyewitnesses of the collision except the drivers of the two cars. Defendant's intestate died almost immediately

after the accident. The cars came to rest on the right-hand side of the street for southbound traffic. There were skid marks 60 or 70 feet from the northbound lane to the southbound lane to within a few feet of plaintiff's automobile. Plaintiff testified that on the day of the accident he owned a 1937 Chevrolet in first class condition, with no damage on it. He then testified to the injuries claimed by him. He was not cross-examined. He gave no testimony as to his conduct and the handling of his automobile at and immediately prior to the collision. At the close of plaintiff's case defendant moved for a directed verdict, which was denied. The jury returned a verdict assessing plaintiff's damages at $10,000. Defendant's motion for judgment notwithstanding the verdict was denied.

[1–4] One of defendant's contentions on appeal is that there is no evidence tending to prove the exercise of due care by plaintiff for his own safety. Plaintiff takes the position that he may prove his case by circumstantial, as well as by direct, evidence; that the position of the cars after the collision and the skid marks on the pavement show that the collision took place in the southbound traffic lane, thereby creating a presumption of negligence on the part of defendant's intestate. Plaintiff, however, was obliged to prove not only that defendant's intestate was guilty of negligence, but that he himself was in the exercise of due care for his safety. It is only in the absence of eyewitnesses to the accident that plaintiff may rely on inferences drawn from circumstantial evidence and habits of care and caution. *Elliott v. Elgin, J. & E. Ry. Co.,* 325 Ill. App. 161. In that case suit was brought for the wrongful death of two of three persons in an automobile which collided with a train of the defendant. No effort was made to procure the attendance of the driver of the car—the third occupant. Over objection of defendant, plaintiffs were permitted to offer testimony of the habits of care of the decedents. On review the court held that this testimony concerning the habits of the deceased was inadmissible because it did not appear that efforts had been made to procure the attendance of the driver. The cause was remanded with directions to enter judgment for defendant for failure to prove the exercise of due care on the part of plaintiffs' intestates. The present case is unlike the case of *Roadruck v. Schultz,* 333 Ill. App. 476, cited by plaintiff. In that case both drivers of the vehicles involved in the collision were killed. There were no eyewitnesses. The court held that the plaintiff's case could be proved by the best evidence available, and, in the absence of eyewitnesses, the jury were warranted in drawing an inference of due care on the part of plaintiff's intestate from the circumstances in evidence. Here the plaintiff appeared as a witness and testified as to his ownership of the auto-

mobile and its condition, and to his ill health following the collision. No reason appears of record why he was not examined as to the circumstances of the collision and his conduct at and immediately before the collision. Under the well established rule that where testimony within the control of a party is not produced a presumption arises that such testimony would be unfavorable to such party, we must presume that plaintiff's testimony in this case as to the circumstances of the collision would have been unfavorable to him. No obligation rested upon the defendant to cross-examine him. Plaintiff having failed to produce any testimony tending to show the exercise of due care on his part, the court should have directed a verdict or, after the verdict, entered judgment for the defendant notwithstanding the verdict.

The judgment is reversed.

Reversed.

Burke, P. J. and Friend, J., concur.

approved Beal Anderson

2723

Abstract

Gen. No. 10520. Agenda No. 1.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1951.

346 I.A. 470

ROSE PETROSKY, Plaintiff-Appellant, vs. THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, Defendant-Appellee.	Appeal from Circuit Court of McHenry County.

WOLFE,-- J.

Rose Petrosky brought a suit in the Circuit Court of McHenry County against the Great Atlantic and Pacific Tea Company, for personal injuries she alleged to have sustained because she fell on the store floor of the defendant company, while she was a regular customer therein. She claims that there was washing powder of some kind upon the floor, and while she was walking over it she slipped and fell and was injured.

In her complaint she charges that the defendant company was operating and controlling a retail grocery store in the city of Woodstock, McHenry County, and that plaintiff was lawfully and rightfully on the premises; that it was the duty of the defendant by its agents and servants to exercise due care and caution for the safety of its customers including the plaintiff, while on the premises; that they negligently allowed and permitted washing powder, or some like substance

Gen. No. 10520. Agenda No. 1.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1931.

ROSE PETROSKY, Plaintiff-Appellant,	Appeal from Circuit Court of McHenry County.
vs.	
THE GREAT ATLANTIC AND PACIFIC TEA COMPANY, Defendant-Appellee.	

WOLFE, -- J.

Rose Petrosky brought a suit in the Circuit Court of McHenry County against the Great Atlantic and Pacific Tea Company, for personal injuries she alleged to have sustained because she fell on the store floor of the defendant company, while she was a regular customer therein. She claims that there was washing powder of some kind upon the floor, and while she was walking over it she slipped and fell and was injured.

In her complaint she charges that the defendant company was operating and controlling a retail grocery store in the city of Woodstock, McHenry County, and that plaintiff was lawfully and rightfully on the premises; that it was the duty of the defendant by its agents and servants to exercise due care and caution for the safety of its customers including the plaintiff, while on the premises; that they negligently allowed and permitted washing powder, or some like substance

to remain on the floor where it was customary for persons to walk, thereby causing the floor to become slippery and dangerous for customers to walk on the same; that the plaintiff while using due care for her own safety, slipped on said washing powder, or other like substance, and fell and was thereby thrown with great force and violence upon the floor, and as a result thereof, she was severely injured.

The defendant filed its answer and admitted that it owned and controlled the store as alleged in the complaint, and also admitted the plaintiff was on the premises of the defendant, but state they have no knowledge of whether the plaintiff was lawfully and rightfully at the invitation of the defendant on said premises. They deny that they negligently permitted washing powder, or other substance to remain on the floor, and specifically deny that the plaintiff was in the exercise of due care and diligence for her own safety, and deny that the plaintiff suffered any injuries caused by their negligence, and denies that she is entitled to any relief or damage thereby.

Later the complaint was amended by asking damages for loss of time from her work and gains and benefits that she would reasonably have acquired if she had not been injured, and that at all times she suffered great pain and mental anguish, and has been compelled to spend large sums of money for services of physicians, surgeons, and hospital care, X-ray treatment and for medicine in endeavoring to be cured of her injuries.

The case was submitted to a jury and after both sides put in their evidence and the instructions of the Court given, the jury found the defendant not guilty. The Court overruled a motion for a new trial and judgment was entered on the verdict

to remain on the floor where it was customary for persons to walk, thereby causing the floor to become slippery and dangerous for customers to walk on the same; that the plaintiff while using due care for her own safety, slipped on said washing powder, or other like substance, and fell and was thereby thrown with great force and violence upon the floor, and as a result thereof, she was severely injured.

The defendant filed its answer and admitted that it owned and controlled the store as alleged in the complaint, and also admitted the plaintiff was on the premises of the defendant, but state they have no knowledge of whether the plaintiff was lawfully and rightfully at the invitation of the defendant on said premises. They deny that they negligently permitted washing powder, or other substance to remain on the floor, and specifically deny that the plaintiff was in the exercise of due care and diligence for her own safety, and deny that the plaintiff suffered any injuries caused by their negligence, and denies that she is entitled to any relief or damage thereby.

Later the complaint was amended by asking damages for loss of time from her work and gains and benefits that she would reasonably have acquired if she had not been injured, and that at all times she suffered great pain and mental anguish, and has been compelled to spend large sums of money for services of physicians, surgeons, and hospital care, family treatment and for medicine in endeavoring to be cured of her injuries.

The case was submitted to a jury and after both sides put in their evidence and the instructions of the Court given, the jury found the defendant not guilty. The Court overruled a motion for a new trial and judgment was entered on the verdict

of the jury, and it is from this judgment that the appeal has been perfected to this Court. It is not assigned as error, nor is it argued by the appellant that the verdict of the jury is contrary to the manifest weight of the evidence, so that if there are no other errors in the trial of the case, the judgment must be affirmed.

The appellant criticizes defendant's instruction No. 14, which is as follows: "If you find from the evidence and under the instructions of the Court, that the plaintiff, by using her faculties with ordinary and reasonable care, could have avoided the injury, but negligently failed to so do, and thereby contributed to her injury, then she cannot recover from the defendant." This instruction has been approved numerous times and is what is commonly called a stock instruction and we find no fault with the language in it.

Defendant's instruction No. 15, is criticized and is as follows: "The Court instructs the jury that at all times and throughout this case the burden is upon the plaintiff seeking to recover herein to prove her case by a greater weight or preponderance of the evidence and to prove the guilt of the defendant. The burden is not upon the defendant to prove that he is not guilty." The cases cited by the appellant as sustaining her criticism of this instruction we do not deem applicable in the present case. This instruction also has been given many times and approved by the Court.

Defendant's given instruction No. 21 is as follows: "One way of impeaching a witness is by showing that the witness has made different and contradictory statements on the same point on a former occasion. If it appears from the evidence that any witness has been impeached in this manner, you have

of the jury, and it is from this judgment that the appeal has been perfected to this Court. It is not assigned as error, nor is it argued by the appellant that the verdict of the jury is contrary to the manifest weight of the evidence, so that if there are no other errors in the trial of the case, the judgment must be affirmed.

The appellant criticizes defendant's instruction No. 14, which is as follows: "If you find from the evidence and under the instructions of the Court, that the plaintiff, by using her faculties with ordinary and reasonable care, could have avoided the injury, but negligently failed to do so, and thereby contributed to her injury, then she cannot recover from the defendant." This instruction has been approved numerous times and is what is commonly called a stock instruction and we find no fault with the language in it.

Defendant's instruction No. 15, is criticised and is as follows: "The Court instructs the jury that at all times and throughout this case the burden is upon the plaintiff seeking to recover herein to prove her case by a greater weight or preponderance of the evidence and to prove the guilt of the defendant. The burden is not upon the defendant to prove that he is not guilty." The cases cited by the appellant as justifying her criticism of this instruction we do not deem applicable in the present case. This instruction also has been given many times and approved by the Court.

Defendant's given instruction No. 21 is as follows: "One way of impeaching a witness is by showing that the witness has made different and contradictory statements on the same point on a former occasion. If it appears from the evidence that any witness has been impeached in this manner, you have

a right to take that into consideration in determining his credibility and the weight of his testimony." This also is a stock instruction and we think the Court did not err in giving it.

Defendant's instruction No. 25 is as follows: "It was the duty of the plaintiff to use reasonable care to reduce the loss or damage, if any, sustained by her as much as reasonably possible. A person may not recover for injury to his person which he knowingly permits to go on without using reasonable care to prevent or diminish it. If you find from the evidence that the plaintiff could have lessened the loss or damage, if any, suffered by her by using reasonable care so to do, then the defendant cannot be charged with liability for any loss or damage resulting from the plaintiff's failure, if any, to use such reasonable care." In quoting this instruction the appellant has put in italics "to his person." Technically this instruction should have been "to her person." Instructions are generally stated in the masculine gender and we find no fault with the wording of the instruction. It is difficult to understand how the plaintiff could have been damaged, or the jury misled by this instruction when it only relates to the amount of damage the plaintiff could recover, if she were successful in the suit. The jury having found against her, any error, if any, in the instruction is harmless.

Complaint is made that the Court erred in giving too many instructions, and especially that five of them directed a verdict. Our Courts have criticized the giving of too many peremptory instructions, but five have not been held to be unreasonable. Some of the defendant's instructions were cautionary, and the jury was told that the instructions should be considered by them as a whole. In this case we think that the jury was fairly instructed.

a right to take that into consideration in determining his credibility and the weight of his testimony." This also is a stock instruction and we think the Court did not err in giving it.

Defendant's instruction No. 25 is as follows: "It was the duty of the plaintiff to use reasonable care to reduce the loss or damage, if any, sustained by her as much as reasonably possible. A person may not recover for injury to his person which he knowingly permits to go on without using reasonable care to prevent or diminish it. If you find from the evidence that the plaintiff could have lessened the loss or damage, if any, suffered by her by using reasonable care so to do, then the defendant cannot be charged with liability for any loss or damage resulting from the plaintiff's failure, if any, to use such reasonable care." In quoting this instruction the appellant has put in italics "to his person." Technically this instruction should have been "to her person." Instructions are generally stated in the masculine gender and we find no fault with the wording of the instruction. It is difficult to understand how the plaintiff could have been damaged, or the jury misled by this instruction when it only relates to the amount of damage the plaintiff could recover, if she were successful in the suit. The jury having found against her, any error, if any, in the instruction is harmless.

Complaint is made that the court erred in giving too many instructions, and especially that five of them directed a verdict. Our Courts have criticized the giving of too many peremptory instructions, but five have not been held to be unreasonable. Some of the defendant's instructions were cautionary, and the jury was told that the instructions should be considered by them as a whole. In this case we think that the jury was fairly instructed.

The appellant complains strenuously that the closing argument of the attorney for the defendant is reversible error, because he opened a box of dreft soap powder and poured some of its contents on the floor and scuffed his feet in it to demonstrate to the jury that it was not slippery. It will be observed that the attorney did not open the box, but it was opened by Mr. Kell. When this box of dreft was first exhibited in Court, objection was made by some one to the exhibit of the box of dreft. To which the Court replied: "Well, the Court is not going to permit this to go into evidence. Counsel may as well know this now." The jury retired and there was a great deal of discussion back and forth between the attorneys relative to the admission of this box of dreft in evidence. The Court stated when it was first brought in, he thought they were going to try to show that this was the identical box of dreft, the powder of which was claimed had caused the accident to the plaintiff, but upon learning that that was not the intention, he admitted the box of dreft in evidence, and the Court then stated: "All you have to do is to indicate the purpose. I have overruled, as the Court understands it now. You want to show that it is similar in substance to that that was on the floor to that. You haven't any objection to that, not disputing that it was dreft." Mr. McCauley, attorney for the plaintiff: "No, apparently everybody agrees it was that. I say it is up to the jury to determine the effect." Court: "Well that is all right." McCauley: "I mean whether it is slippery or not." This all happened out of the presence of the jury.

Mr. Heinz testified that he got that particular box of dreft in the A and P Store, and it had not been opened until that time, and he stated that the dreft that appeared in the box

The appellant complains strenuously that the closing argument of the attorney for the defendant is reversible error, because he opened a box of draft soap powder and poured some of its contents on the floor and scuffed his feet in it to demonstrate to the jury that it was not slippery. It will be observed that the attorney did not open the box, but it was opened by Mr. Hall. When this box of draft was first exhibited in Court, objection was made by some one to the exhibit of the box of draft. To which the Court replied: "Well, the Court is not going to permit this to turn into evidence. Counsel may as well know this now." The jury retired, and there was a great deal of discussion back and forth between the attorneys relative to the admission of this box of draft evidence. The Court stated when it was first brought in, he thought they were going to try to show that this was the same box of draft, the powder of which was claimed and insisted upon by the plaintiff, but upon learning that this was not the intention, he admitted the box of draft in evidence, and the Court then stated: "All you have to do is to indicate the purpose. I have overruled, as the Court understands it now. You want to show that it is similar in order to show that it was on the floor to that. You haven't any objection to that, not disputing that it was draft." Mr. Collins, attorney for the plaintiff: "No, apparently everybody agrees to that. I say it is up to the jury to determine the effect." Court: "Well that is all right." McGauley: "I mean whether it is slippery or not." This all happened out of the presence of the jury.

Mr. Holme testified that he got that particular box of draft in the A and P Store, and it had not been opened until that time, and he stated that the draft that appeared in the box

was the same kind of powder that they had in their store on Jan. 31, 1948. The Court, then over the objection of the attorney for the plaintiff, admitted the box in evidence.

The evidence seems to be clear that the powder introduced in evidence was the same, and similar in appearance as that which the plaintiff claimed caused her to slip and fall. Mr. Parker, one of the attorneys for the defendant, in arguing to the jury whether the powder in question was slippery, sprinkled some on the floor, at which time the plaintiff's attorney objected on the ground that it was up to the jury to determine whether soap powder is a slippery substance. So far as the abstract shows, plaintiff's attorney did not argue the case after the defendant's attorney had concluded his argument. The arguments of attorneys to the jury should confine themselves to the evidence introduced in Court, and draw reasonable deductions therefrom, and of course, each side will present their case in the most favorable light for their client. The control of the arguments is largely left to the trial court, and in the present case the Court found that the argument of defendant's attorney was not improper. The statement in the abstract concerning what the attorney really did with the powder, is not very definite. The abstract says after he put the powder on the board Parker then stated to the jury, "you can't slip on that substance" demonstrating. What he did is left purely to speculation. We are inclined to think that probably the attorney for the defendant carried the demonstration too far, but we are of the opinion that considering the circumstances it was not reversible error.

On the whole it is our conclusion that the plaintiff has had a fair trial, and the judgment of the trial court should be affirmed.

Judgment affirmed.

was the same kind of powder that they had in their store on Jan. 31, 1918. The Court, then over the objection of the attorney for the plaintiff, admitted the box in evidence.

The evidence seems to be clear that the powder introduced in evidence was the same, and similar in appearance as that which the plaintiff claimed caused her to slip and fall. Mr. Parker, one of the attorneys for the defendant, in arguing to the jury whether the powder in question was all nearly, sprinkled some on the floor, at which time the plaintiff's attorney objected on the ground that it was up to the jury to determine whether soap powder is a slippery substance. So far as the abstract shows, plaintiff's attorney did not argue the case after the defendant's attorney had concluded his argument. The arguments of attorneys to the jury should confine themselves to the evidence introduced in court, and draw reasonable deductions therefrom, and of course, each side will present their case in the most favorable light for their client. The control of the arguments is largely left to the trial court, and in the present case the Court found that the argument of defendant's attorney was not improper. The statement in the abstract concerning what the attorney really did with the powder, is not very definite. The abstract says after he put the powder on the board Parker then stated to the jury, "you can't slip on that substance" demonstrating. What he did is left purely to speculation. We are inclined to think that probably the attorney for the defendant carried the demonstration too far, but we are of the opinion that considering the circumstances it was not reversible error.

On the whole it is our conclusion that the plaintiff has had a fair trial, and the judgment of the trial court should be affirmed.

Judgment affirmed.

207 A

45640

LYON & HEALY, INC., an Illinois corporation, Plaintiff-Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
MATCHLESS ELECTRIC COMPANY, an Illinois corporation, Defendant-Appellant.	)	OF CHICAGO

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer. Trial by the court without a jury resulted in a finding and judgment for possession in favor of the plaintiff. The premises in controversy are the fourth floor of the building known as 168 North Ogden Avenue, in the City of Chicago, County of Cook and State of Illinois. Defendant appeals.

Since 1935 the premises involved have been in possession of defendant as tenant of the plaintiff. The last written lease executed by the parties was for the period commencing April 30, 1946, to April 30, 1949, at a monthly rental of $570. More than thirty days before the expiration of that lease a written notice was served upon defendant by plaintiff for possession on the date of the termination of the lease. Defendant remained in possession and the parties negotiated for a new lease. Plaintiff asked for an increase in the monthly rental from $570 to $625 and subsequently prepared a written one-year lease with the increased rental.

Neither of the parties executed this lease. After the preparation of the one-year lease Dittman, president of

defendant company, requested a lease for a three-year term. Plaintiff prepared a written lease for a two-year term containing a six-months' cancellation clause and monthly rental of $625. This lease was sent to defendant for signature with a letter dated June 23, 1949 which reads: "We have had the lease retyped showing the period of two years as you requested * * * Will you please sign both copies of the lease and rider, have them attested by the secretary of your corporation, and return them for signature by our company. After we sign them we will return your copy."

The evidence shows that defendant did not respond to plaintiff's letter, nor did it return the two-year lease. According to the testimony Conlan, treasurer of plaintiff, shortly after sending the two-year lease to defendant he inquired of Dittman, why the two-year lease had not been signed and returned. Conlan said Dittman replied that he had not "gotten to it but he would." Dittman testified in substance that after receiving the two-year lease he informed Conlan that defendant would not accept the lease because of the six-months' cancellation clause but would remain in the premises for one year at the increased rental. Defendant made monthly payments of $625 to plaintiff for the entire two-year period.

March 28, 1951 plaintiff notified defendant in writing that its right to possession would terminate on April 30, 1951.

Defendant says that before the expiration of the written lease commencing April 30, 1946 the parties agreed

to an oral lease for one year and that by holding over after the oral one-year lease it became a tenant from year to year and was therefore entitled to a sixty-day notice of termination under the provisions of Section 5, Chapter 80, Volume II, Illinois Revised Statutes 1951, State Bar Association Edition.

Plaintiff insists that defendant remained in possession of the premises under the terms of the two-year written lease, even though it had not been signed by the parties, and that defendant was therefore obliged to surrender the premises to plaintiff at the expiration of the term without notice. In the alternative, plaintiff also urges that defendant was a month to month tenant, hence the thirty-day notice of termination given on March 28th was adequate.

There was a sharp conflict in the testimony of Conlan and Dittman. We do not agree that the overwhelming weight of the evidence supports defendant's contention that the parties entered into a one-year oral lease commencing April 30, 1949. In our view the trial court was warranted in finding the defendant agreed to accept the two-year lease and was bound by its terms. (See Sheriff v. Kromer, 232 Ill. App. 589.) Under these circumstances the notice of termination was sufficient.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

Kiley, P. J. and Feinberg, J., Concur.

346 Ill. App. 10

45569

CATHERINE S. McGOWEN, Plaintiff - Appellant, v. EDWARD J. McGOWEN, Defendant - Appellee.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a separate maintenance proceeding. Plaintiff has appealed from an order for temporary support for her and her daughter, and for attorney's fees.

The parties were married August 15, 1925. Two boys were born of the marriage, Edward, Jr. and Wade, now about 25 and 23 years old respectively. A third child, Sarah Marie, now about 15 years old, was adopted when she was an infant. Defendant left the family home March 3, 1949, and plaintiff filed this suit March 11, 1949. On April 4, 1949 she was allowed temporary support of $500.00 for herself and $150.00 for her daughter per month, and attorney's fees and expenses of $750.00. May 5, 1950 her second attorney was allowed $1000.00. April 10, 1951 the order appealed from was entered. The order increased the allowance for temporary support from $500.00 to $600.00 per month for plaintiff, continued the $150.00 per month allowance for Sarah Marie, and allowed plaintiff's second attorney a second fee of $1000.00 and $362.80 for litigation expenses. The chancellor made the payment of support for plaintiff contingent upon her cooperation with defendant in the preparation and execution of joint income tax returns.

The order denied plaintiff's prayer for reimbursements of $3000.00 and $150.00; for reimbursement of her expenses in supporting Wade for about six weeks just before he came of age; and for an accounting of one-half of the proceeds of the sale in 1944 of a house owned by the parties.

Plaintiff contends the chancellor committed reversible error in the hearing and that the decree is erroneous because it makes insufficient and conditional provision for plaintiff, insufficient provision for Sarah Marie, inadequate allowance of attorney's fees, and fails to award plaintiff the reimbursements and the accounting.

After the hearing and before the order was entered, the chancellor talked alone with Sarah Marie in chambers. Plaintiff argues on the authority of Albert v. Albert, 340 Ill. App. 582, that this event constituted prejudicial error. In the Albert case, the child was offered as a corroborating witness to the alleged cruelty of her father. Here the purpose was to afford the chancellor an opportunity to appraise the child, whose alleged emotional disturbance and intellectual slowness were relevant factors in determining the extent of her need of support. The child was not present during the hearing and there was no opportunity for the chancellor to observe her. We see no reversible error in this event unless it influenced the chancellor to enter an unreasonable order. We cannot, however, approve what occurred. In Benson v. Raymond, 105 N. W. (Mich.) 870, there was no inspection or observation in chambers out of the presence of the parties or their attorneys.

The order denied plaintiff's prayer for reimbursements of $3000.00 and $150.00; for reimbursement of her expenses in supporting Wade for about six weeks just before he came of age; and for an accounting of one-half of the proceeds of the sale in 1944 of a house owned by the parties.

Plaintiff contends the chancellor committed reversible error in the hearing and that the decree is erroneous because it makes insufficient and conditional provision for plaintiff, insufficient provision for Sarah Marie, inadequate allowance of attorney's fees, and fails to award plaintiff the reimbursements and the accounting.

After the hearing and before the order was entered, the chancellor talked alone with Sarah Marie in chambers. Plaintiff argues on the authority of Albert v. Albert, 340 Ill. App. 582, that this event constituted prejudicial error. In the Albert case, the child was offered as a corroborating witness to the alleged cruelty of her father. Here the purpose was to afford the chancellor an opportunity to appraise the child, whose alleged emotional disturbance and intellectual slowness were relevant factors in determining the extent of her need of support. The child was not present during the hearing and there was no opportunity for the chancellor to observe her. We see no reversible error in this event unless it influenced the chancellor to enter an unreasonable order. We cannot, however, approve what occurred. In Benson v. Raymond, 105 N. W. (Mich.) 870, there was no inspection or observation in chambers out of the presence of the parties or their attorneys.

Defendant admits plaintiff is entitled to support sufficient in amount to provide for herself and Sarah Marie in view of the station in life to which they have been accustomed, their necessities, and ability of defendant to pay. Plaintiff claims that she was precluded by erroneous rulings of the chancellor from showing her needs and defendant's financial ability.

The chancellor quashed subpoenaes duces tecum served upon the Chicago Forging and Manufacturing Company and the McGowen Company, in both of which the testimony showed defendant had a financial interest. As to the first subpoena, plaintiff wished to show whether the 1950 dividend was the result of an accumulation of reserve or of one year's dividends, and the likelihood of another dividend in 1951. The first purpose may have aided the chancellor in evaluating defendant's stock in the company, but the second purpose we think fruitless since, at the time, the declaration and payment of the dividend in 1951 rested with the directors, not the books. As to the second subpoena, the purpose of plaintiff was to search back twenty years or so for information about whether defendant had told the truth about the sale of his stock in the McGowen Company. We think there was no prejudice in the rulings of the chancellor. The question of defendant's wealth was not necessary or pertinent to the hearing. Defendant had admitted an income which could be accommodated to any temporary needs claimed by plaintiff.

We need not comment upon the partiality, nor its basis, shown by defendant in favor of Edward, Jr. over Wade. This is not relevant because it does not bear on the question of adequacy of funds available for the temporary needs of plaintiff and Sarah Marie.

The chancellor excluded from evidence an itemized list of estimated monthly expenses prepared by plaintiff. Plaintiff had already testified to some of the items. There was no attempt to elicit oral testimony to the remaining items by having plaintiff refer to the document. No reason was given for objecting to the statement. The contention of error in the ruling is immaterial if the order was reasonable.

The main question is whether the temporary allowance is unreasonable so as to constitute an abuse of the chancellor's discretion.

In the first place, that part of the order which purports to deny plaintiff an accounting of the proceeds of the sale of the Flossmoor house is erroneous. The chancellor had no jurisdiction over property rights in this separate maintenance proceeding. Petta v. Petta, 321 Ill. App. 512.

At the time of the hearing, plaintiff was paying $156.50 per month rent for the apartment in which the family lived when the parties were separated. She was paying $25.00 per month rent for a garage for a Buick automobile which she owned. There was evidence for the chancellor of special needs of Sarah Marie, including dental work, scholastic tutoring and psychological training.

Defendant's gross income ranged from $18,000.00 in 1943 to $42,000.00 in 1950. Of a $37,000.00 income in 1949, $5,000.00 consisted of dividends from Chicago Forging and Manufacturing Company stock. Of his 1950 income, $6,000.00 consisted of income from that stock. There was testimony that these were the only years in which dividends had been paid on the stock, and that the 1950 dividend was a tax-saving device. According to plaintiff, defendant's 1950 net income after taxes was $29,821.51. According to defendant it was $27,500.00. The allowance to plaintiff for herself and Sarah Marie amounted to $9,000.00. Income tax on these allowances to plaintiff are to be paid by defendant under a joint return. Defendant maintains $15,000.00 in insurance in favor of the children, about $35,000.00 face value payable to his estate, and $20,000.00 of insurance under policies irrevocably assigned to plaintiff. Premiums on this insurance amount to $1119.34 annually. Defendant has already paid, during the pendency of this proceeding, $2,750.00 for plaintiff's attorney's fees.

We think there is no abuse of discretion shown by the record and circumstances of this case. The temporary allowances are within the range of any temporary needs shown by the record. We have studied the itemized list that was excluded from evidence, and it is our opinion that if admitted it would not necessarily compel different allowances than were made. We do not find the allowances unreasonable. We think the allowance of $1000.00 attorney's fees, making a total of $2750.00 temporary fees, was not unreasonable.

We are not called upon to view the order before us as any other than a temporary one. Affirmance of the order should not be used as a basis for inferring its sufficiency as a permanent order. At this time, questions which should enter into consideration of a permanent allowance are not important. Some of these questions are of the state of plaintiff's furniture, of her long range health considerations, of Sarah Marie's future, of security in the future for plaintiff through ordering payment of insurance premiums in her favor, etc., and if necessary, of defendant's wealth and ability to pay. This recital of some questions should not be taken as exclusive of any other which may be pertinent.

The passage of March 15th has probably rendered moot the question of conditioning the allowance to plaintiff upon her cooperation in preparation and execution of joint income tax returns. In any event, we see no abuse of discretion in coercing her cooperation in the use of this favorable income tax device.

For the reasons given, that part of the order denying the accounting is reversed and the balance of the order is affirmed.

ORDER REVERSED IN PART
AND AFFIRMED IN PART.

LEWE, J. CONCURS.

FEINBERG, J. TOOK NO PART.

Pend 5-13-52 file with # 710

We are not called upon to view the order before us as any other than a temporary one. Affirmance of the order should not be used as a basis for inferring its sufficiency as a permanent order. At this time, questions which should enter into consideration of a permanent allowance are not important. Some of these questions are of the state of plaintiff's furniture, of her long range health considerations, of Sarah Marie's future, of security in the future for plaintiff through ordering payment of insurance premiums in her favor, etc., and if necessary, of defendant's wealth and ability to pay. This recital of some questions should not be taken as exclusive of any other which may be pertinent.

The first order for temporary support totalling $650 per month was entered April 4, 1949 without taking testimony, the amount having been suggested by defendant's attorney. On October 21, 1949 the matter was set for hearing December 5, 1949, the order providing that any amounts over and above the amounts granted in the April 4 order be made retroactive to October 21, 1949. The order appealed from was entered April 9, 1951 on a petition filed October 2, 1950. This petition prayed that the amount to be paid by defendant be retroactive to April 4, 1949. The chancellor did not grant this prayer but made the increase of $100 per month for plaintiff effective April 1, 1951. Plaintiff contends that it was error for the chancellor to ignore the order of October 21, 1949 and the prayer of the petition and to refuse to make the increase retroactive. The record does

not sustain the contention. There is no showing that the chancellor should have found that the original allowance resulted in unsatisfied needs of which determined complaint had been made. We need not decide whether the retroactive provision in the October 21, 1949 order bound the chancellor who entered the instant order, assuming, though not deciding, that the provision was not limited to the December 5, 1949 hearing.

The passage of March 15th has probably rendered moot the question of conditioning the allowance to plaintiff upon her cooperation in preparation and execution of joint income tax returns. In any event, we see no abuse of discretion in coercing her cooperation in the use of this favorable income tax device.

For the reasons given, that part of the order denying the accounting is reversed and the balance of the order is affirmed.

ORDER REVERSED IN PART
AND AFFIRMED IN PART.

LEWE, J. CONCURS.

FEINBERG, J. TOOK NO PART.

formerly filed in 342 Ill. App. 303

211

45028

FREDERICK SEEDS, a minor, etc., et al., Appellees, v. CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

346 I.A. 472

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought this action against defendant for personal injuries resulting from a collision between an automobile in which plaintiffs were riding and a passenger bus operated by defendant. On appeal from the judgments entered as to each plaintiff, this court (342 Ill. App. 303) reversed the judgments and remanded the cause with directions to enter judgment for defendant. Upon further appeal to the Supreme Court (409 Ill. 566), the judgment of this court was reversed as to plaintiff Mrs. James A. Wood and the cause remanded to this court with directions "to consider other errors relied upon for reversal, if any there be, and, thereupon, to either affirm the judgment of the circuit court of Cook County in favor of Mrs. James A. Wood, or reverse it and remand the cause for a new trial." The appeal as to plaintiffs Frederick Seeds and George Seeds was dismissed by the Supreme Court because improvidently taken. The cause is now before us only as to plaintiff Mrs. James A. Wood.

The record discloses the following facts. On May 6, 1947, at about 6:30 P.M., Frederick Seeds was driving his 1929 Oldsmobile sedan automobile in a northwesterly

direction along Higgins Road, a four-lane highway in the city of Chicago; that riding as guests with him were his father, George Seeds, his sister, Mrs. James A. Wood, and her husband, together with their small baby; that the brother-in-law, James A. Wood, was riding in the front seat while the father, sister, and the baby occupied the rear seat of the automobile; that proceeding in the same direction, and immediately in front of the Seeds car, was a passenger bus operated by defendant; that both the bus and the Seeds car were proceeding along the inside lane near the middle of the street; that the pavement was wet from a rain which had fallen a short time earlier in the afternoon; that the bus stopped for the purpose of discharging passengers at Meade Avenue, whereupon the right front of the Seeds car came in contact with the left rear portion of the bus, causing some damage to both vehicles; that the Seeds car had been following behind the motorbus for a distance of about one and one-half city blocks; that the bus and the car, prior to the time the bus slowed down for its stop, were proceeding at the same rate of speed; that the distance between the bus and the car, as they proceeded along the street, was about 50 feet; that according to the bus driver the bus was proceeding, as shown by its speedometer, at the rate of 18 to 20 miles per hour just prior to the time it began to slow down for the stop at Meade Avenue; that prior to the bus stop both the bus and the car were traveling along the inside westbound traffic lane near the middle of the street; that buses do not ordinarily stop to discharge passengers from the inside traffic lane; that the

regular bus stop at Meade Avenue was adjacent to the outside traffic lane along the curb or edge of Higgins Road and about 20 feet from the street intersection; that when the bus was approximately 50 or 60 feet east of the intersection with Meade Avenue, a signal was given to the bus driver that passengers desired to alight at that point; that thereupon the bus suddenly changed direction to proceed out of the inside traffic lane into the outer lane along the right-hand side of the street, so that the passengers could be discharged along the side of the street; that the bus stopped suddenly and its rear end skidded or swerved back into the inside traffic lane along which plaintiff was riding in the Seeds car; that the bus came to rest in a diagonal position effectively blocking both westbound traffic lanes, with its front end extending about 10 or 15 feet across the Meade Avenue intersection; that an eastbound bus was approaching from the other direction so that the Seeds car could not turn left into the eastbound traffic lane; that the car did not strike the bus directly in the rear but contacted only the extreme left rear corner of the bus; that Frederick Seeds immediately applied his brakes when the bus started to slow down and put the brakes on hard when the bus began to skid back into the inside traffic lane along which his car still was traveling; that the brakes on the Seeds car were in good condition; that the Seeds car was about 30 to 40 feet behind the bus when the bus stop lights went on; and that the bus could not be brought to a full stop, traveling 18 to 20 miles per hour, in less than 50 feet after its brakes were applied, except in case of an emergency.

The witness Meggison, who was following about 25 feet behind the Seeds car at the same rate of speed as the bus and the Seeds car were progressing, testified that he saw the stop lights come on the bus when it was about 15 feet from Meade Avenue, which was past the regular bus stop, then saw the stop lights of the Seeds car go on and remain on until the point of impact, and that the Seeds car then swerved into the eastbound traffic lane and its stop light went off. The witness James A. Wood testified that immediately after the impact Frederick Seeds released the brakes of the car and coasted along the side of the bus, out of the eastbound traffic lane back into the westbound lanes, bringing the car to a complete stop. This testimony tends to refute any inference that the Seeds car was out of control at the time of the occurrence.

Frederick Seeds testified that when the bus stop lights went on he immediately applied his brakes, and if his reaction time was only one second he would have traveled only 29 feet before applying his brakes and would have had all the remaining distance of 51 to 61 feet in which to come to a stop. The evidence shows that other cars were in the line of traffic, traveling at the same rate of speed, behind the Seeds car and the bus, and that the car only 25 feet behind the Seeds car was able to come to a stop without incident. There was also evidence that the bus was traveling along the inside traffic lane as it approached and passed the regular bus stop at Meade Avenue; that the bus unexpectedly swerved out of that traffic lane toward the outside lane of Higgins Road, suddenly applied its brakes, skidded back in front of the Seeds car and came to a full stop, obstructing both traffic lanes.

Upon this state of facts the Supreme Court said:

> "The evidence * * * tends to show that the bus was brought to a sudden and abrupt stop, so as to obstruct the highway along which it had been traveling, without having due regard for following traffic, and that plaintiff Mrs. James A. Wood was injured as a proximate result of such negligence. * * * there was sufficient evidence in the record to authorize the submission of the charges contained in the complaint to the jury."

There was a sharp conflict in the testimony of the occurrence witnesses.

Inasmuch as the Supreme Court has held that plaintiff could not be held guilty of contributory negligence as a matter of law, and that the evidence in this record as to the negligence of the defendant and due care of the plaintiffs was properly submitted to the jury and became questions of fact for the jury to determine, we cannot say upon a further study of the facts that the jury's verdict was against the manifest weight of the evidence. We are satisfied that the evidence amply supports the verdict.

Defendant complains of plaintiff's instructions numbered 10, 11, 14 and 17. Instruction 10 is complained of because the driver of the car, Frederick Seeds, 19 years old at the time of the accident, was only required to exercise that degree of care which an ordinarily prudent child of his age, capacity, experience, education and intelligence would exercise under the same or similar circumstances. It is argued that he should be held to the same degree of care as an adult. Defendant relies principally upon Maskaliunas v. C. & W. I. R. R. Co., 318 Ill. 142. In that case the minor was 7 years of age, and the court said:

> " * * * in the case of a child above the age of fourteen years the same rule shall be applied to him in that regard as is applied to adults, his intelligence and experience being considered."

This court, in Wolf v. Budzyn, 305 Ill. App. 603 (Second Division), sustained a similar instruction and pointed out that in the Maskaliunas case there was no need for the court to announce the rule of care required of a child over 14 years of age (the child in that case being 7 years of age), since that question was not in the case, and the statement in regard to the degree of care was "dictum." We regard the instruction not objectionable.

Instruction 11, defendant says, ignored the element that Seeds, the driver, was negligent in getting himself into a dangerous position behind the bus. The cases of Edwards v. Hill-Thomas Lime Co., 378 Ill. 180; North Chicago Street Ry. v. Cossar, 203 Ill. 608; and Alexander v. Sullivan, 334 Ill. App. 42, relied upon by defendant, are factually distinguishable. It can be fairly said in the instant case that neither plaintiff nor the driver Seeds placed himself in a position of danger, which distinguishes this case from the cases relied upon by defendant.

The objection to instruction 14 is that it told the jury the negligence, if any, of the driver of the car was not imputable to the plaintiff if they believed that plaintiff herself was exercising ordinary care and caution for her own safety. This instruction conforms to the rule laid down in Swanlund v. Rockford Ry. Co., 305 Ill. 339, 346, and sustained by this court in Budek v. City of Chicago, 279 Ill. App. 410, 423. In similar circumstances, where the plaintiff was merely a passenger in the car, this court said in Greene v. Citro, 298 Ill. App. 25:

> "If all the passenger-guests should constantly be warning and directing the driver how to proceed he would be so distracted as to be unable to drive the car carefully. Back seat driving should not be encouraged."

To the same effect is Chandler v. Chicago Transit Authority, 337 Ill. App. 655.

Instruction 17 complained of was one relating to damages. It is contended that the instruction permitted recovery for such damages "so far as such damages and injuries, if any, are shown by the evidence," whereas the instruction should have required them to be proved by a "preponderance" of the evidence. It is sufficient to observe that instruction 15 for defendant, relating to damages, required plaintiff to prove them by a preponderance or greater weight of the evidence as to each one of the claimed injuries and disabilities. When read together the jury could not have been misled by the omission complained of, and therefore the omission does not constitute reversible error.

We think defendant has had a fair trial. Accordingly the judgment is affirmed.

AFFIRMED.

KILEY, P.J., AND LEWE, J., CONCUR.

212

45545

346 I.A. 473

ESTHER T. BLAIR, Appellee, v. FREDERICK A. GARIEPY, Appellant.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action to recover attorney's fees and other moneys retained by defendant, plaintiff's attorney, from moneys collected for her. Defendant filed a counterclaim for moneys advanced to plaintiff. Issues were joined and trial by the court without a jury resulted in a finding and judgment in favor of plaintiff and denial of defendant's counterclaim. Defendant appeals.

In the May Term 1949, of the Superior Court of Cook County, plaintiff was granted a decree of divorce from her husband Raphael Blair. There were born of the marriage between plaintiff and Raphael Blair two children named Mary Jane and Sandra, aged seventeen and sixteen years, respectively. The divorce decree provided that plaintiff have custody of the children and that the question of alimony, child support, attorney's fees, and property rights of the parties be referred to a master in chancery. No hearings were had before the master in chancery. Plaintiff's former husband appealed from the divorce decree to this court. In September 1949 defendant was employed by plaintiff to represent her in the divorce proceeding in this court where the decree was affirmed. See Blair v. Blair, 341 Ill. App. 93.

The record shows that in the divorce proceeding in the Superior Court an order was entered directing defendant in that proceeding, Raphael Blair, to pay plaintiff $900 "as and for attorney's fees on the appeal" and $200 for expenses, in three equal monthly installments within ninety days. This order further provided that Raphael Blair pay $200 a month beginning December 9, 1949, pending disposition of the appeal, for alimony and support money for his wife and minor child.

Afterwards defendant Gariepy instituted in behalf of plaintiff a partition suit involving the residence owned by plaintiff and her divorced husband at Hinsdale, Illinois. Issues were joined in that proceeding but before a decree was entered in the partition suit the premises were sold by the Blairs for $21,000. A deed, dated March 14, 1950, was executed conveying the Hinsdale property to Lloyd M. Griffin and his wife, and delivered to Bell Savings and Loan Association by the attorneys representing the Blairs. The receipt for the deed issued by the Association states, among other things, that when the DuPage Title Company is willing to issue its usual form of mortgage policy the Association would pay the mortgage indebtedness on the premises incurred by the Blairs, and other items, and remit the remainder "to the order of Charles W. Hadley and Fred A. Gariepy, attorneys for Raphael Blair and Esther T. Blair." When the real estate transaction was closed at the offices of the Association neither of the Blairs was present. After deducting the mortgage indebtedness, the prorated taxes, broker's commission,

title charges, and other items, there was due the Blairs a balance of $14,892.29. The Association issued a check to Gariepy "as attorney for Esther Blair," plaintiff here, for $7,446.15, as her share of the proceeds of the sale. Defendant Gariepy deposited this check to his account and then issued his personal check to plaintiff for $5,270.30. The difference between the Association check to Gariepy and the check he gave plaintiff is the sum of $2,175.85, which Gariepy retained for the following services and moneys advanced in behalf of his client:

Legal services in the divorce proceeding in Superior Court of Cook County.....	$1,000.00
Legal services in partition suit.....	1,018.65
Fees paid to Clerk of Appellate Court...	10.00
Fees for serving subpoenas.....	12.20
Services in connection with the rental and purchase of real estate.....	35.00
Legal services in suits before justices of the peace in which Mrs. Blair was a party.....	100.00

The complaint as amended charges that defendant "wrongfully induced" Bell Savings and Loan Association to issue a check payable to defendant for plaintiff's share of the proceeds of the sale of the Blair residence, and that defendant "misappropriated" the sums which he withheld from plaintiff. Defendant answered denying the charges in the complaint, and filed a counterclaim alleging that he advanced the sum of $300 to plaintiff. Plaintiff admits having received this sum.

The trial court found the issues in favor of plaintiff and entered judgment against defendant for $2,732, and also found against defendant on his counterclaim.

Defendant contends that he had a right to retain the amount of his charges, for services and moneys advanced, from plaintiff's share of the proceeds of the sale of her real estate which came into his hands. In Needham v. Voliva, 191 Ill. App. 256, the court held, at page 258, "If the relationship of attorney and client exists, the possessory lien will cover in general any property of any kind belonging to the client and held by the attorney. It includes ordinary legal documents of the client in the possession of the attorney, or money collected by the attorney." As a general rule an attorney has the right to deduct and retain the unpaid balance due him for fees from funds in his hands which belong to the client, and this is so although it is claimed that he is not entitled to fees or to the amount of fees claimed by him. (7 CJS, Sec. 193, Page 1096.)

Plaintiff argues that defendant is not entitled to any fees from her on the ground that he was unfaithful to the trust she reposed in him, and in support of her position relies on People v. Cole, 84 Ill. 327; Faber v. Enkema, 231 NW. 410 (Minn.); and Broholm v. Anderson, 178 Ill. App. 623, We think the facts of the cases last cited are dissimilar and therefore not applicable. In the Cole case an attorney retained money in excess of the amount claimed for collection fees. In the Faber case an attorney

withheld money in excess of his agreed compensation; and in the Broholm case an attorney borrowed money from a client which belonged to the estate of her deceased son. The evidence in the instant case shows that the defendant withheld only the amount which he claimed due him for fees and expenses, and promptly remitted the remainder to his client the plaintiff.

The undisputed evidence shows that defendant was having some disagreement with his client relative to fees and withdrew as her attorney of record from the divorce proceeding on March 31, 1950; that defendant accepted the sum of $700 from Raphael Blair in full settlement of the $1,100 allowance made by the Superior Court on December 13, 1949 for attorney's fees and expenses for legal services in defending the appeal in this court; and that on May 15, 1950 an order was entered in the Superior Court satisfying the order for the allowance.

Plaintiff insists that defendant had forfeited his right to any fees for services in the Appellate Court for the reason that he made this settlement with Raphael Blair without the knowledge or consent of plaintiff. We think plaintiff's position is untenable.

The record shows that in the course of the trial in this case defendant's counsel asked a witness what the fair and reasonable charge was for the services rendered by defendant in the proceeding in the Appellate Court. Plaintiff's counsel stated, "There is no question about fees," and thereupon moved "that all testimony regarding

the Appellate Court proceeding be stricken." The trial court sustained plaintiff's motion. By this ruling the question of fees and expenses allowed for defending the divorce case in the Appellate Court was eliminated. Since this issue was no longer in the case the only issues before the trial court were the right of defendant to retain the money claimed for fees and services, and the counterclaim. The uncontroverted evidence shows that the plaintiff did receive $300 from defendant as alleged in the counterclaim. Therefore the counterclaim should have been allowed.

The money retained by defendant for fees and services was based upon six specific items. An examination of the record fails to disclose that the trial court made any findings on these items or how it arrived at the amount of the judgment. In the first of these items, which related to the services rendered in the divorce proceedings in the Superior Court, the defendant's testimony tends to prove that he spent 152 hours in this proceeding and that his charges were reasonable. But there is a sharp conflict between the testimony of the plaintiff and defendant as to the terms of his employment. Plaintiff testified that defendant agreed to get his fees for these services from plaintiff's former husband. Defendant stated that he appeared in the Superior Court twelve times and on each of these occasions he told the plaintiff she would have to bear this expense unless the court directed her husband to pay.

As to the second item the complaint charges that defendant was not authorized to file a partition suit. There is evidence tending to prove that plaintiff did authorize defendant to institute this suit and that the charges were fair.

Likewise defendant offered proof supporting the remaining items for services and advances.

Since we hold that the defendant did not forfeit his right to fees because of his alleged misconduct, each of these items presented an issue of fact.

We are unable to reconcile upon any theory the amount of the judgment, $2,732, and the amount withheld by defendant, $2,175.85. Assuming but not deciding for this purpose that defendant was entitled to withhold no fees, this would not justify a judgment for a greater amount than he retained. This difficulty is aside from consideration of the $300, subject to the counterclaim, which plaintiff admits receiving from defendant. The lack of any foundation in the record for the amount of the judgment in our view necessitates a reversal of that judgment.

For the reasons given, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED
FOR A NEW TRIAL.

Kiley, P. J., and Feinberg, J., Concur.

45563

ELIZABETH MACLEAN, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT,
H. NIELSON and F. C. PILGRIM, d/b/a Pilgrim & Company, Appellants.	)	COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse a judgment in the sum of $2,500 entered on the verdict of a jury in an action to recover damages for personal injuries claimed to have been sustained by plaintiff as a result of a fall upon a defective cement walk in the rear of a building owned by Nielson, managed by defendant Pilgrim, and occupied by plaintiff as a tenant.

The building in question consists of four apartments and a basement located at 725 and 727 N. Lorel Avenue in the City of Chicago on the east side of the street and facing west. In the rear of the building at about the center there was a wooden stairway extending in an easterly direction between the first floor rear porch and the ground level. On each side of the stairway there were banisters extending from the back porch to the bottom step. At the bottom of the stairway there was a cement walk and immediately north of the wooden stairs there was a cement stairway leading west to the basement of the building. Between the bottom of the riser of the first wooden step and the cement walk there was a space of 1-1/2 or 2 inches. The bottom of the

riser of the lowest step rested on the cement retaining wall of the stair well leading into the basement and between this retaining wall and the cement walk there was a crevice. The edge of the cement walk at this point was broken and irregular. The oral testimony and the photographs in evidence show that the crevice is about 4 inches long, 2-1/2 or 3 inches deep, and 3 inches wide.

According to plaintiff's testimony, on September 27, 1947 about 3:30 o'clock in the afternoon she was in the basement washing some rugs in a washing machine. When she returned to her apartment on the first floor momentarily she left the washing machine running. At that time she observed her son, aged 5-1/2 years, playing on the cement sidewalk. While she was in the apartment picking up some towels she heard her son cry and she returned to the basement. While descending the stairs from the first floor porch she stepped down on the cement sidewalk with her left foot into the crevice where it became lodged, causing her to fall to the bottom of the basement stair well. Plaintiff had resided in the building as a tenant for about nine years and used the back stairway almost every week during that period for the purpose of washing clothes. She also testified that in July of 1947 she told defendant Nielson that her daughter had "tripped" at the place where she (the plaintiff) fell; that she had requested Nielson to "fix the sidewalk" and that Nielson said he would "take care of it."

Defendants contend that the trial court erred in denying a judgment notwithstanding the verdict, for the reason that plaintiff failed to prove that she was in the

exercise of due care and that the evidence fails to prove that defendants or either of them were guilty of negligence.

Our Supreme Court has repeatedly held that when all the necessary elements of a cause of action are charged in a complaint and there is evidence in support of the plaintiff's case which, if taken as true, with all reasonable intendments therefrom most favorable to the plaintiff, tends to establish the negligence charged, the case should be submitted to a jury for its consideration. See White v. City of Belleville, 364 Ill. 577, and cases there cited. In the instant case there is evidence tending to show that the crevice or opening between the cement walk and the retaining wall of the basement stair well existed about one year and a half before the accident and that about two months before the plaintiff fell she called defendant Nielson's attention to it, and that at that time he agreed to repair the defect. From this evidence we think the jury could find that defendants were guilty of negligence.

Plaintiff's use of the walk on the day of the accident with knowledge of the defect was not negligence per se as a matter of law but was a circumstance to be taken into consideration by the jury with all the other facts and circumstances in determining whether she was guilty of contributory negligence. (Wallace v. City of Farmington, 231 Ill. 232; City of Mattoon v. Faller, 217 Ill. 273; Reule v. City of Chicago, 268 Ill. App. 266.)

From an examination of the record we are of the opinion that the evidence was sufficient to warrant the submission of this cause to the jury and the denial of defendants' motion for judgment notwithstanding the verdict.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND FEINBERG, J. CONCUR.

Gen. No. 10440 Agenda No. 35

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1951

EDNA MAE WILLEY, Plaintiff-Appellant,	Appeal from
vs.	Circuit Court
GEORGE LOUIS WILLEY, Defendant-Appellee.	Kane County, Illinois

ANDERSON -- J.

Edna Mae Willey, plaintiff-appellant, filed her suit for separate maintenance in the Circuit Court of Kane County against her husband, George Louis Willey, defendant-appellee. After a hearing, the trial judge dismissed her complaint for want of equity, and she has appealed to this court. The complaint alleged in substance that the parties were married in 1914 and were divorced in October, 1939; that they remarried in 1940 and lived together until November, 1948, when she was compelled to leave her home because of ill health; that in January, 1949, she returned to Aurora near her home, but has never lived with her husband since November, 1948. The complaint further alleges that due to the obscene, inhuman conduct, course treatment, and miserliness of her husband, she was compelled to leave him, and that to live with him would injure her health and render her life miserable. The complaint contained various other allegations as to the cause of her leaving, and further averred that she has no funds, and she asks that her husband be required to support her by a decree for separate maintenance.

Gen. No. 10140 [illegible]

OCTOBER [illegible] 1

[illegible]

[illegible] TILLEY,
Plaintiff- [illegible]

vs.

[illegible]
Defendant- [illegible]

[illegible]

APPEALS -- [illegible].

[illegible] Allen, on July [illegible] last, [illegible] for [illegible] tenancy in the Fourth [illegible] [illegible] Tilley, plaintiff- [illegible]. [illegible] complaint for waste of equity, [illegible] [illegible]. [illegible] alleged in substance that the [illegible] October, 1920, that they remained [illegible] 1920, when the was [illegible] January, 1924, [illegible] her husband since December, 1920. The complaint further [illegible] the occasion, [illegible], she was compelled to leave [illegible] and render her life miserable. The complaint [illegible] as to the cause of her leaving, and further [illegible] she asks that her husband be required to [illegible] maintenance.

The defendant filed an answer to the complaint denying all the charges and asking that the plaintiff's suit be dismissed. Appellant urges the court was in error in dismissing her complaint for want of equity and for not entering a decree of separate maintenance for her.

As the principal questions involved on this appeal are factual, it becomes necessary to review the testimony, distasteful as it is. The evidence is uncontroverted that the parties during all their married life resided on a farm consisting of one hundred six acres. The farm is a combination grain and poultry farm, and is worth about $20,000.00. The other property of the defendant amounts to about $10,000.00. The property is all in his name. The home where the parties resided is a large home, equipped with electricity, one bedroom on the first floor and two on the second floor. The house has a hot air furnace, has a water system and toilet facilities on the sedond floor. Defendant admits that his wife was a good housekeeper and a good wife.

Edna Mae Willey testified that her husband was penurious with her so far as giving her money for necessities was concerned, but there is no evidence that the family did not have enough to eat. She testified that throughout their married life, he constantly used profane and obscene language. She testified as to his personal habits: that he used a can to urinate in in their bedroom, although they had toilet facilities upstairs, and the odor from this was terrible; and that she remonstrated with him about this and he said, "If you don't like this, you know what you can do"; that at the table his nose would run, and he would wipe his nose with his hands which made her sick, and once he spit in her plate; that in the mornings during the winter he would go to the basement with a newspaper and have a bowel movement and throw it into the furnace, which made a sickening odor all through the house; that she remonstrated with him about this, but he paid no attention to her. She further testified as to other unclean habits around the kitchen sink; that he would come to the

The defendant filed an answer to the complaint [illegible] and asking that the alimony [illegible] be dismissed. [illegible] was in error in [illegible] her own libel for [illegible] ing a decree of separate maintenance and [illegible].

[illegible] the original proceeding [illegible] necessary to review the testimony. [illegible] uncontroverted that [illegible] fare consideration of the [illegible] counting fare, and [illegible] and amounts to [illegible]. [illegible] where the [illegible] room on the first floor and [illegible] furnace, but [illegible] and would [illegible].

[illegible] as giving her [illegible] that the family [illegible] their marital [illegible] filed to life [illegible] between, although they [illegible] was terrible, and [illegible] you don't like this, [illegible] run, and he would [illegible] which made [illegible] spit in her plate; that in the morning [illegible] to the bedroom with a newspaper and have a loud [illegible] see, which made a [illegible] with him about this, but he paid no attention to her. [illegible] as to other unclean habits around the kitchen sink; that he would come to the

table after he had treated his rectum, and would refuse to wash his hands; all these unclean actions affected her sleep. She further testified that shortly before their last separation she went to New Hampshire for her health. Her husband gave her some of her expenses. She testified on direct and on cross examination that her health improved in New Hampshire, and she did not go back to her husband on the ground that she thought it would jeopardize her health; that she would rather be dead than live with him. She stated that she has not been employed since returning to Aurora, where she is now residing with her sister.

On cross examination she further testified that her husband provided her with very little clothing during their married life; that her relatives had given her considerable clothing; that they had an electric stove, and that her husband complained about its using too much electricity, and said, "Throw the damn thing out; it uses all of the electricity."

Irene Place, sister of the plaintiff, testified that she had been in the parties' home many times, that the physical condition of the home was bad, the paper on the stair walls was hanging down, and that the furniture on the whole was junk; that some of the chairs were in such bad condition that the arms had fallen off; that this was the condition of the house just prior to the final separation of the parties; that the family gave Mrs. Willey clothes; that when her sister came back from New Hampshire, her health was much improved, but she was not too strong, and tired easily.

Georgian Dickerson testified on behalf of the plaintiff as follows: She is a daughter of the parties and lived in their home for some time; with reference to the urine cans, that they caused a mauseating odor throughout the house; she had seen her father empty the can in the wash basin and use a dishcloth to wash out the sink. She further corroborated the testimony of her mother as to the defendant's habits with reference to his bowel movements,

and said that she had noticed an awful odor in the house in the morning from early fall until late spring for the eight years she was there. In her testimony she further corroborated the testimony of her mother as to other indecent habits of her father with reference to eating without washing his hands, which was nauseating.

George Willey, the defendant, testified that he had trouble with his rectum, and that he had been treated for this ailment from time to time for several years. He admitted he used the urine can in the bedroom, and claimed that he used it because he was not able to go upstairs and use the toilet. He stated he always washed his hands before he came to the table. The reason he used the basement for a toilet was that he did not want to dirty up the house, in consideration of wife, who he said was a good housekeeper. He further testified that the furnace had no leaks; that after his wife left him, a furnace man, Eugene Hopper, who later testified as a witness, tested the furnace for leaks with a sulphur bomb and that there was no sulphur odor in the house. He also testified that he sent his wife money while she was in New Hampshire and he thought it would average about $25.00 a week; that he knew she was going for a vacation and a rest, but that she had not returned to his home. He gave considerable testimony about his financial affairs, and claimed his wife had never asked him to repair the house or to buy new furniture; that he gave her adequate money for groceries; that he bought his wife some clothes; that she had never asked him for money for clothing; that he never noticed any odor from the furnace; and that his wife never protested to him about it. He testified that he wants his wife to come back home, and denies that she is entitled to any relief.

Mrs. Frank C. Willey was called as a witness on behalf of the defendant. She is a daughter-in-law of the parties, and lives on the farm in an adjoining house. Her husband farms the farm with his father. She testified that the house was well furnished. She had never seen the husband mistreat his wife or heard

and said that she had not [illegible]
early fall until late spring [illegible] there. [illegible]
many the further consideration [illegible] to [illegible]
habits of her father [illegible]
was unmarried.

George Miller, the [illegible]
and that he had been [illegible]
years. He exhibited [illegible]
used it because he [illegible]
he always worked [illegible]
basement for a [illegible]
small in of wife, [illegible]
the farmer had [illegible]
Hopper, who [illegible]
auburn hair and [illegible]
filed that he [illegible]
it would average [illegible]
and a rest, [illegible]
testimony [illegible]
him to repeat [illegible]
for protection [illegible]
him for money for clothing [illegible]
and that his wife never [illegible]
his wife to come back home [illegible]

Mrs. Frank [illegible] Miller [illegible]
She is a daughter-in-law of the [illegible] and lives [illegible]
house. Her husband farms the farm with his father. [illegible]
was well furnished. She had never seen the husband [illegible]

him use profane or sharp language toward her. She did not know anything about Mr. Willey's habits as to cleanliness because she was hardly ever in the house. She had noticed no odor in the house except creosote when the defendant was using it as a medicinal remedy. She was there at the time Hopper made the sulphur test in the furnace, and she smelled no odor.

Eugene Silas Hopper testified on behalf of the defendant. He was a furnace man, and he testified that he had tested the furnace with a sulphur bomb and found no leaks; that there was no odor from the sulphur; and that this was a standard test to determine whether a furnace was leaking.

In rebuttal William B. Stevens was called as a witness on behalf of the plaintiff, and testified that he had been a heating engineer since 1937. He testified as an expert witness that pungent odors can leak out around the fire door, around the cleanout door, even if the doors fit very tightly, or where the smokepipe fits. He also testified that if the cleanout door was open or cracked, any gases or odors in the furnace would come out of that door and ascend into the house as well as going out the smokepipe. There is further evidence in the record that the cleanout door in the furnace was cracked.

The plaintiff maintains that she has made out a case entitling her to a decree of separate maintenance. A wife who is not herself at fault is not required to live with her husband if his conduct is such as to directly endanger her person or her health, nor if the husband persists in wrongful conduct toward her which will necessarily render her life miserable and living with him unendurable. (Johnson vs. Johnson, 125 Ill. 510; Sewell vs. Sewell 297 Ill. App. 283.)

It is not necessary for a wife to so sustain her grounds for separate maintenance that the proof would be sufficient to entitle her to a divorce. A husband's conduct toward his wife may be of such a nature, although he does not starve or beat her, that it will justify her leaving him and obtaining

him was prolong or at [illegible] for [illegible].

Mr. Wilfrey's habits as to [illegible] became the [illegible] by [illegible].
She had noticed no [illegible] in the house [illegible] crucible [illegible]
using it as a medicinal remedy. [illegible] the [illegible]
subjects best in the [illegible], and she [illegible] to [illegible].

Suppose Jill [illegible]
may, and be [illegible]
found no [illegible] that [illegible]
standard test to determine [illegible].

In medical [illegible]
plausibility and [illegible]
testified as [illegible]
door, around the [illegible]
the [illegible]
crackled, [illegible]
around [illegible]
evidence [illegible]

The plaintiff [illegible]
degree of a [illegible]
required to [illegible]
her person or her [illegible]
her which will [illegible]
unconducible. (Johnson [illegible], 175 [illegible], [illegible]
[illegible] 282.)

It is not necessary for [illegible] to establish her [illegible]
maintenance that the [illegible] be sufficient to [illegible] her [illegible].
A husband's conduct toward his [illegible] may [illegible], although he may
not starve or beat her, that it will justify her leaving him and obtaining

relief if she is without fault. In Johnson vs. Johnson, 24 Ill. App. 80, at page 82, the court well states the law as follows:

"A woman's life may be made miserable and cohabitation with her husband made unbearable by other means than the inflicting by him of blows upon her person; and while in this case there is not great violence often repeated shown by appellant toward appellee, there is evidence of coarse and brutal conduct and also instances of physical violence."

In Seelye vs. Seelye, 45 Ill. App. 27, at page 34, this court said:

"It appears from Wahle v. Wahle, 71 Ill. 516, it is not necessary that there should be statutory grounds for divorce in all cases to authorize a decree of separate maintenance in favor of the wife, that is, to justify her in living separate and apart from her husband. But it is sufficient 'if a persistent unjustifiable course of conduct necessarily rendering the life of the wife miserable' exists."

The rule in the Seelye case, supra, was again announced by this court in Mellanson vs. Mellanson, 113 Ill. App. 81.

This court again in Kohn vs. Kohn, 337 Ill. App. 391 recognized the rule that a wife is not bound to live with her husband if his conduct endangers her health and inevitably renders her life miserable and unendurable. The court in this case found that the wife did not have good cause to leave her husband, and reversed the decree of the trial court awarding separate maintenance.

The law is also well established and public policy requires that the courts uphold the sanctity and stability of the marriage relation; that incompatability of disposition, occasional outbursts of passion, and trivial difficulties will not justify a separation. (Johnson vs. Johnson, 125 Ill. 510; Kohn vs. Kohn, supra; Strong vs. Strong, 326 Ill. App. 513.)

Houts vs. Houts, 17 Ill. App. 439, involved a separate maintenance suit where the Appellate Court reversed the decree of the Circuit Court awarding the wife separate maintenance. The court, recognizing the rule that trivial difficulties between husband and wife should not be ground for separate maintenance, says on page 443 of the above opinion:

"...Families should not be broken up on account of trifling differences between husbands and their wives. The public is interested in the stability of the domestic relations. As the facility for obtaining decrees for divorce and separate maintenance increases, the spirit of compromise and forgiveness in the

relief if she is without fault. In Johnson vs. Johnson, [illegible]

page 32, the court well states the law as follows:

"A woman's life [illegible]
made undesirable by other [illegible]
person, and would [illegible]
by exposing her [illegible]
and also in danger of [illegible]

In Cable vs. Cable, [illegible]

"It appears from [illegible]
[illegible]
of her misdemeanor [illegible]
[illegible]
unjustifiable course [illegible]
misconduct [illegible]

The wife in this [illegible]

Johnson vs. Johnson, [illegible]

This court again [illegible]
that [illegible]
health [illegible]
this case [illegible]
revoked [illegible]

The [illegible]
[illegible]
bility or [illegible]
ties will not [illegible]
Kohn vs. Kohn, [illegible]

Hunt vs. Hunt, 17 [illegible]
where the [illegible] found revoked [illegible]
wife separate maintenance. The court, recognizing the [illegible]
cuities between husband and wife should not be [illegible] separate maintenance,
says on page 143 of the [illegible] opinion:

"...Families should not be [illegible] on account of [illegible]
between husbands and their wives. The world is interested in the stability of
the domestic relations. [illegible] the facility for [illegible] separate maintenance increases, the spirit of compromise and forgiveness in the

home decreases, and while the remedy provided by this salutary statute should in no case be withheld from a wife who lives separate and apart from her husband without her fault, she must be held to a reasonable compliance with the rule requiring every complainant to make out his or her case by a preponderance of the proof."

It is not necessary again to review the nauseating testimony contained in the record. We are convinced that the testimony of the plaintiff, corroborated by the testimony of her daughter, entitled the plaintiff to the relief sought. It must be remembered that these parties had lived together for more than thirty-five years. She had put up with his filthy habits as long as she could. The evidence disclosed that while he did not beat or starve her, his conduct toward her was so revolting and indecent that it made her life unendurable. The evidence also discloses that he was penurious and gave her very few of the comforts of life to which people in their financial status should be accustomed. The evidence discloses that she was a good wife. The husband had no fault to find with her. She had helped accumulate their farm and did all the usual duties customarily performed by a housewife. The stability of the marriage relation is important but the defendant's conduct was such that it would nauseate any normal person. He seeks to justify his conduct by reasons of health, but in view of the toilet facilities of the home, we do not think they are justified. They had accumulated property worth $30,000 and she should not be thrown out on the charity of her friends without support. We are convinced that the odor from the burning excrement would be unbearable to a woman of even less sensitiveness than the plaintiff. There is confliot on this subject, but the evidence is corroborated by the plaintiff's daughter and we believe it is true. It appears that his vile habits had become worse after their first separation. A wife is not a chattel of her husband and the rights of human dignity did not require her to put up with such conduct. She was not in good health--had had two thyroid operations, had a hernia, had high blood pressure, was nervous and could not sleep. While there is no medical testimony that her ill health was due to her

home decorous, and so to the [illegible]. In [illegible] marriage [illegible] in no case be withheld from a wife who lives [illegible] separate from her husband without her fault, she must be in [illegible] with [illegible] requiring every consideration to make out [illegible] the proof."

It is not necessary again [illegible] the record. [illegible] by the testimony of her husband, [illegible] It must be remembered that [illegible] five years. He had [illegible] evidence. It appeared that [illegible] her was so [illegible] there. The [illegible] if life to which [illegible] evidence [illegible] with her. [illegible] carelessly performed [illegible] is important but the [illegible] normal person. [illegible] the [illegible] They had accumulated [illegible] the liberty of her friends [illegible] the "Union" [illegible] than the plaintiff. There is [illegible] corroborated by the plaintiff's daughter [illegible] that his wife [illegible] not a habitual of her husband or the right [illegible] to her to out up with such conduct. [illegible] operations, had a hernia, but [illegible] sleep. While there is no medical testimony that her ill health [illegible] to her

husband's conduct, her testimony as to her poor health was uncontradicted and we think it is a fair inference to assume that the life which she was compelled to lead affected her health.

Appellee urges in substance that when his wife went to New Hampshire she intended to return to him when her health improved. She testified that she intended to return to her husband, but changed her mind when she reached the vicinity of her home. At that time the plaintiff still had grounds for separate maintenance. She did not in fact leave her husband until her return home when she decided she would not live with him. In our opinion this did not condone the past offenses, and the manifest weight of the evidence discloses that she was living separate and apart from her husband without fault on her part and with fault on his part. We find from the evidence that the plaintiff was justified in leaving her husband because his conduct was such that it endangered her health and rendered her life miserable and unendurable. The reasons for her leaving her husband were not trivial but of long duration, serious in their nature, and they entitled her to a decree of separate maintenance. While the court is not unmindful that the findings of the chancellor should be given great weight, nevertheless on the whole record, we find that he erred in dismissing the plaintiff's complaint for want of equity. The trial court is directed to enter a decree of separate maintenance for the plaintiff and to then consider the amount of support money to be awarded the plaintiff and to consider the question of plaintiff's solicitor's fees.

Reversed and remanded with directions.

husband's conduct, her testimony is to her own health [illegible]
we think it is a fair inference [illegible] the life [illegible]
to lead affected her health.

[illegible] urges in mitigation [illegible]
intended to return to him when her [illegible]
intended to return to her husband, but [illegible]
vicinity of her home. [illegible]
marriage. The [illegible]
she during the [illegible]
the past summer, and the [illegible]
the living quarters and [illegible]
with fault on his part. [illegible]
lived in Louisville, her [illegible]
her health and her [illegible]
her leaving her husband [illegible]
nature, and they [illegible]
court is not unlawful [illegible]
weight, [illegible] on the [illegible]
the plaintiff's [illegible]
enter a decree of separation [illegible]
the amount of support money to [illegible]
question of plaintiff's [illegible]

Reversed [illegible] for which [illegible].

Abstract

General No. 10440 Agenda No. 6

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

- - - 340 I.A. 374

October Term, A. D. 1950

- - -

EDNA MAE WILLEY, Plaintiff-Appellant, vs. GEORGE LOUIS WILLEY, Defendant-Appellee.	APPEAL FROM THE CIRCUIT COURT OF KANE COUNTY, ILLINOIS.

Dove, J.

Edna Mae Willey on March 10, 1949, filed her complaint in the Circuit Court of Kane County for separate maintenance. Upon a hearing before the chancellor a decree was rendered dismissing the complaint for want of equity. To reverse this decree, plaintiff presents this appeal.

The complaint alleged that the parties thereto were married on May 6, 1914; that there were born to their marriage two children, both of whom are now of legal age; that on October 4, 1939, plaintiff and defendant were divorced; that on April 1, 1940, they were remarried and continued to live together until November 20, 1948, when plaintiff was forced to leave her home because of ill health; that she took a vacation for a number of weeks and upon her return on

January 31, 1949, she went to the home of her mother in Aurora and still resides there.

The complaint further alleged that soon after her remarriage defendant commenced a course of cruel and inhuman treatment of her; that he engaged in tirades and used obscene and profane language toward her and made threatening remarks on many occasions; that he deprived her of the ordinary household conveniences and facilities and engaged in other cruel and inhuman conduct toward the plaintiff which injured her health and that such misconduct on the part of the defendant rendered the plaintiff's life with him miserable, unbearable and dangerous to her health and safety. The answer was a denial of these general charges.

The evidence discloses that the plaintiff and defendant lived on a farm of approximately 105 acres which was improved with a two-story house consisting of about ten rooms; that they were people of modest means and were engaged in farming and poultry raising; that their married son lived in a tenant house on the farm and engaged in farming with his father on a partnership basis; that a divorced daughter and her paralytic son made their home with the plaintiff and defendant in this home. For a great number of years the defendant had been bothered with some type of disease, fungus in nature, which affected the lower half of his body and which often caused him to be quite nervous and which necessitated frequent use by him of the toilet facilities and required repeated treatment of the parts of his body affected by the disease. The plaintiff, during several years immediately preceding the separation, was

bothered by a thyroid disturbance, which, at times, was rather severe.

The chief complaints made by the plaintiff against the defendant as a basis for her contention that he is entitled to a decree of separate maintenance are the unclean personal habits of the defendant and his stingy, penurious and inconsiderate treatment of, and attitude toward, her.

There is no reason for a lengthy review of the testimony found in this record. Only the parties hereto and their children testified in support of, or in contradiction of, the allegations of the complaint and answer.

Plaintiff's evidence with reference to defendant's personal habits in and about the basement, the bedroom, the kitchen and the dining table, if believed and if unexaggerated and not misrepresented, would support an action for separate maintenance if the plaintiff left the defendant because of such misconduct. However, his alleged misconduct, even if true, was not the cause of the plaintiff's separating from the defendant. The plaintiff alleged in her complaint that by reason of the alleged misconduct on the part of the defendant she became ill and was forced to leave their home on the 20th of November, 1948, and live elsewhere. The evidence discloses that on November 20, 1948, she left her home, near Aurora, with the consent and approval of her husband, and went to the State of New Hampshire, where she spent several weeks visiting a relative. Her testimony with reference to the separation follows:

"Q. At the time you left in November 1948 did you go away on a vacation or did you intend at that time to leave him permanently?

"A. I went for my health to see if the rest would do me good.

"Q. At the time you left in November, 1948, did you intend to return to your husband? A. I would have returned if I thought my health would have permitted it. I found that my rest had done me a world of good and I was feeling so much better when I arrived back here that I just could not see how I could go back and live there because I knew it would jeopardize my health again and I just could not make up my mind to go back, I would rather be dead.

"Q. At the time you left in November, 1948, did you intend to return to your husband when you got back? A. When I got back if my health would have permitted I would have went back, but I could not see how it would. My health had improved while I was gone. I just could not go back. I could not make up my mind to go back.

"Q. When did you decide not to go back? A. When I arrived here the first week I was feeling so much better that is when I arrived at the thought that I could not go back.

"Q. After you returned to Aurora, is that when you decided you could not go back? A. Yes.

"Q. You decided not to return to your husband after you returned to Aurora from New Hampshire?

"A. That is right.

"Q. At the time you went to New Hapshire you did not intend to leave your husband? A. No."

The evidence conclusively shows that the plaintiff did not separate from the defendant because of his alleged misconduct. She testified that when she returned she was feeling much better and it was then that she determined that she would not continue to live with the defendant. On December 10, 1948, in a letter from Dover, New Hampshire, to defendant she wrote: "Yes, I do feel fifty per cent better than I did while I was home. I may not be back for quite a while yet." Since the plaintiff, by her own testimony, has

shown that the alleged misconduct of the defendant was not the prime or motivating purpose which caused her to leave, she cannot later decide not to live with the defendant and then give reasons for such separation which, although existing at the time of the separation, were not sufficiently compelling to cause the plaintiff to leave the home of the defendant and reside separate and apart from him.

It is clear to us that the plaintiff did not leave the defendant because of his alleged misconduct, and, therefore, she has failed to bring herself within the requirements of the statute for separate maintenance (Ill. Rev. Stat. 1949, Ch. 68, Sec. 22; Jones Ill. Stat. Ann. 109,190). She did not intend to leave her husband permanently when she started on her vacation on November 20, 1948, but did intend to return to him. After returning to Aurora from her vacation in New Hampshire, she changed her mind. The law is that if a wife leaves her husband voluntarily, or by consent, or if her misconduct has materially induced the course of action on the part of the husband upon which she relies as justifying the separation, she is not without fault within the meaning of the law. Amberson v. Amberson, 349 Ill. 249 at page 253; Johnson v. Johnson, 125 Ill. 510. In this case plaintiff must prove that she left her husband because of his misconduct, that such misconduct justified her in leaving, and that she was without fault on her part. Amberson v. Amberson, supra; Rafferty v. Rafferty, 337 Ill. App. 277; ~~[illegible]~~. In Arliskas v. Arliskas, 343 Ill. 112, 115, it is said: "The law is well settled that where the evidence is conflicting the finding of chancellor will not be disturbed unless it is clearly against the preponderance of the evidence.

The chancellor saw the witnesses and heard them testify and was in much better position to determine their credibility than we are. A court of review will not disturb the findings of the chancellor under such circumstances unless it is apparent that error has been committed."

It is also insisted that the court erred in excluding proper evidence offered by the plaintiff to show that she was unable to work. The court properly sustained an objection to a question calling for a conclusion as to whether the plaintiff was able to work. The plaintiff later, however, was permitted to testify as to her physical condition and her inability to work.

Her ability or inability to work only goes to the question of the amount that she would be entitled to if allowed separate maintenance, and since, under our view of the case, she is not entitled to separate maintenance, it is of no consequence.

After a careful review of this record, we are satisfied that the chancellor's findings are not against the manifest weight of the evidence. The decree of the Circuit Court of Kane County dismissing the plaintiff's complaint should therefore be affirmed.

Decree affirmed.

221 /

45513

IN THE MATTER OF THE ESTATE OF OSCAR NELSON DAVIS, deceased.	)	APPEAL FROM
JOHN ANDERMAN, Appellee,	)	CIRCUIT COURT,
v.	)	
RICHARD W. DAVIS, Executor of the Estate of Oscar Nelson Davis, deceased, Appellant.	)	COOK COUNTY.

346 I.A. 574

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

John Anderman filed a claim in the Probate Court of Cook County against the Estate of Oscar Nelson Davis, deceased. A jury trial resulted in a verdict and judgment in favor of Anderman for $15,048.29, which was designated as a seventh-class claim. Richard W. Davis, executor of the estate, appealed to the Circuit Court where a judgment was also entered on the verdict of a jury in favor of Anderman for $13,502.47. After the executor's motions for new trial and arrest of judgment were overruled the judgment was modified and re-entered in favor of claimant Anderman for $13,002.47 and costs. The executor of the Estate of Oscar Nelson Davis appeals.

The claim alleged in substance that prior to December 25, 1938 the claimant (Anderman) had performed services for the deceased; that about December 12, 1940 the deceased told the claimant that in consideration of the services performed and for additional services he might perform in taking care of the deceased's personal and

business affairs "whenever it may be necessary," deceased "would bequeath to the claimant the sum of $10,000 together with a mortgage on the property located at 5255 Adams Street and would also devise to the claimant property located at 2612 New England Avenue"; that in accordance with the agreement the claimant devoted all of his spare time to attending the deceased and his affairs; and that the claimant relying on the agreement faithfully performed his part but that the deceased either "by mistake or by willful breach of faith" failed to make the bequests as alleged.

On Anderman's motion that part of the claim averring that the deceased agreed to devise to him the property located at 2612 New England Avenue was dismissed.

Two witnesses testified in behalf of Anderman, Mrs. Helen M. Lynch, his sister-in-law, and Mayme Ballard, a nurse employed by the deceased continuously for about ten years preceding his death on July 31, 1948. The testimony of Mrs. Lynch is substantially as follows. Anderman, a carpenter contractor, first met the deceased in September 1938, when he was employed to do some remodeling on a building which the deceased owned at 5255 West Adams Street in the City of Chicago. At that time these premises were unoccupied and the deceased requested Anderman to take care of them during the winter. Throughout the winter of 1938-1939 Anderman purchased coal and performed janitor and other necessary services at the Adams Street property. On Christmas day 1938 the deceased while visiting the Anderman home asked Anderman to sell the Adams Street property and stated to Anderman at

that time "I will remember you for it." In March 1939 at the deceased's request Anderman procured a purchaser and afterwards at the time of the sale the deceased stated to Anderman, "You sure took a load off my mind, John; I am going to take care of you." Anderman also took charge of the premises on New England Avenue which were owned by the deceased. April 7, 1939 the deceased suffered a cerebral hemorrhage and employed a nurse, Mayme Ballard, who attended him until his death. In October 1940 while the deceased was at the Anderman home he asked to be taken to the Mercy Hospital where he remained about six months. About two weeks before Christmas of 1940 Anderman, accompanied by Mrs. Lynch, visited the deceased at the Hospital. On this occasion Anderman offered to take the deceased into his home. While the deceased was at the Hospital Mayme Ballard, his nurse, had been injured in an automobile accident and was confined in the same hospital. The deceased stated, "I don't want to give up my apartment but I will have to depend on you now more than ever for the things you have done for me and the things I will ask you to do in the future. I am going to leave you ten thousand dollars, the Adams Street mortgage, and the New England property."

From the time Anderman first met the deceased until his death Anderman was at the beck and call of the deceased and during this period Anderman was frequently called upon to render services in connection with the deceased's personal and business affairs. He often acted as the deceased's chauffeur. On one of these occasions in the fall of 1941

while the deceased was having dinner at the Anderman home he asked Anderman to drive to Eagle River, Wisconsin, where he owned a golf course. Anderman was reluctant to leave the city but the deceased said, "Well, you know what I promised you, John. I can't go without you; I need you." Anderman drove the deceased to Eagle River where he remained for 8 or 10 days. At the time Anderman was first engaged the deceased was about sixty-five years of age and had retired from business. He was a bachelor and lived alone.

Mayme Ballard testified that she was employed by the deceased on April 7, 1939 and served as his nurse and companion until his death; that she first met Anderman on April 9, 1939; that thereafter Anderman either visited the deceased or communicated with him by telephone several times a week; that the deceased "would get very depressed and ask to have Anderman come to talk to him"; that shortly after she started working for the deceased he told her that he "regarded Anderman as a son or brother" and thereafter "said it many times"; that on many occasions when the deceased would mention something about the Andermans he said "he was going to take care of John"; and that she never listened to any of the conversations between Anderman and the deceased relating to his business.

The record shows that the will of the deceased dated October 30, 1940 made specific bequests to relatives and friends. Anderman was bequeathed the sum of five hundred dollars; Mayme Ballard received a bequest of three hundred dollars. By his will the deceased also created a trust

which terminated in six years. Named among the beneficiaries of the trust were Anderman's four daughters who received one hundred fifty dollars each. August 31, 1942 the deceased made a codicil to his will increasing the bequest to Mayme Ballard from three hundred dollars to one thousand dollars but confirming the will of October 30, 1940 in all other respects.

There was evidence that the inventory of the deceased's estate shows a balance due on the mortgage on the Adams Street property of $3,502.47. The jury were instructed in effect that if they believed from a preponderance of the evidence that the decedent made an agreement as set forth in this instruction then Anderman was entitled to recover $9,500 in addition to the $500 bequeathed to him by the deceased, and also the sum of $3,502.47, the value of the mortgage on the Adams Street property. The jury returned a verdict for $13,502.47 which was reduced to $13,002.47. Anderman does not question the amount of the judgment.

Proof of the existence of the oral agreement which is the basis of Anderman's claim rests solely on the testimony of Mrs. Lynch. With respect to the services rendered by Anderman to the deceased during the ten-year period immediately preceding his death the testimony of Mrs. Lynch was corroborated in almost every detail by Mayme Ballard.

An express contract may be proved not only by direct evidence of an actual agreement and the express words used by the parties but also by circumstantial evidence.

while the deceased was having dinner at the Anderman home he asked Anderman to drive to Eagle River, Wisconsin, where he owned a golf course. Anderman was reluctant to leave the city but the deceased said, "Well, you know what I promised you, John. I can't go without you; I need you." Anderman drove the deceased to Eagle River where he remained for several weeks. At the time Anderman was first engaged the deceased was about sixty-five years of age and had retired from business. He was a bachelor and lived alone.

Mayme Ballard testified that she was employed by the deceased on April 7, 1939 and served as his nurse and companion until his death; that she first met Anderman on April 9, 1939; that thereafter Anderman either visited the deceased or communicated with him by telephone several times a week; that the deceased "would get very depressed and ask to have Anderman come to talk to him"; that shortly after she started working for the deceased he told her that he "regarded Anderman as a son or brother" and thereafter "said it many times"; that on many occasions when the deceased would mention something about the Andermans he said "he was going to take care of John"; and that she never listened to any of the conversations between Anderman and the deceased relating to his business.

The record shows that the will of the deceased dated October 30, 1940 made specific bequests to relatives and friends. Anderman was bequeathed the sum of five hundred dollars; Mayme Ballard received a bequest of three hundred dollars. By his will the deceased also created a trust

which terminated in six years. Named among the beneficiaries of the trust were Anderman's four daughters who received one hundred fifty dollars each. August 31, 1942 the deceased made a codicil to his will increasing the bequest to Mayme Ballard from three hundred dollars to one thousand dollars but confirming the will of October 30, 1940 in all other respects.

There was evidence that the inventory of the deceased's estate shows a balance due on the mortgage on the Adams Street property of $3,502.47. The jury were instructed in effect that if they believed from a preponderance of the evidence that the decedent made an agreement as alleged in the claim then Anderman was entitled to recover $9,500 in addition to the $500 bequeathed to him by the deceased, and also the sum of $3,502.47, the value of the mortgage on the Adams Street property. The jury returned a verdict for the full amount. The record does not disclose why the judgment was reduced to $13,002.47. Anderman does not question the amount of the judgment.

Proof of the existence of the oral agreement which is the basis of Anderman's claim rests solely on the testimony of Mrs. Lynch. With respect to the services rendered by Anderman to the deceased during the ten-year period immediately preceding his death the testimony of Mrs. Lynch was corroborated in almost every detail by Mayme Ballard.

An express contract may be proved not only by direct evidence of an actual agreement and the express words used by the parties but also by circumstantial evidence.

(In re Estate of Burke, 303 Ill. App. 235.) In the present case we are in accord with the contention of the executor that the proof of the making of the oral agreement and its terms must be clear and convincing (Wurth v. Hosman, 410 Ill. 567), and that the evidence should be carefully scrutinized if it appears that the oral agreement is contrary to the provisions of the will (Weidler v. Seibert, 405 Ill. 477), and this circumstance could be taken into consideration by the jury as bearing upon the improbability of the agreement having been made as alleged in Anderman's claim. (See Fierke v. Elgin City Banking Co., 366 Ill. 66.) There is no doubt that the deceased had a high regard for Anderman and relied on him to handle his personal and business affairs during the last decade of his life, nor that Anderman served the deceased faithfully. No testimony was offered by the executor tending to refute the testimony of Anderman's witnesses. Nor does the evidence show that Anderman received any compensation for his services during the life of the deceased. Under these circumstances we think the jury might reasonably infer that Anderman, a stranger in blood, would not have served the deceased for ten years unless the deceased had agreed to make the bequests as alleged in the claim. Whether there was an oral agreement presented an issue of fact for the jury to determine. In this case two juries heard and saw the witnesses and found in favor of Anderman. In our view the evidence was sufficient to warrant the findings of the jury.

Anderman's claim consists of three items, $10,000, the mortgage on the Adams Street property, and the devise of the New England Avenue premises. The record shows that Anderman's counsel made a motion to strike the third item from the complaint after the trial court indicated that this part of the alleged oral agreement violated the statute of frauds.

The executor contends that the dismissal of the third item, which relates to the New England Avenue premises, constitutes an amendment of the claim and thus creates a new and different cause of action. We think this contention is without merit. By striking this item at the court's suggestion Anderman did not assert a new claim or ask for different or additional relief but merely reduced the claim. The record also shows that at the trial the executor's counsel insisted on reading to the jury Anderman's entire claim, including the stricken item. The trial court ruled that since the stricken portion was no longer an issue in the case it could not be read to the jury. We think the court ruled properly.

Finally the executor contends that the second instruction given to the jury at the request of Anderman is defective. This instruction is based on Anderman's theory of the case and is supported by the evidence. The instruction complained of correctly states the law. (See In re Estate of Burke, 303 Ill. App. 235.)

We have considered the other points argued and the authorities cited in support thereof but in the view we take of this case it is unnecessary to discuss them.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND FEINBERG, J. CONCUR.

224 A

45522

EMMA THIEME, Appellee, v. STEVE HARRIS and OLGA HARRIS, Appellants.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment in the sum of $4,000 entered on the verdict of a jury in an action to recover damages for personal injuries alleged to have been sustained by plaintiff as the result of a fall through a trap door in the premises operated by defendants as a night club where plaintiff was employed as a hat-check girl.

In a former appeal this court reversed an order dismissing the cause at the close of the plaintiff's evidence (340 Ill. App. 419).

Defendants operated a night club known as "Club Hollywood," furnishing entertainment, food and beverages to their patrons. They also provided a cloak room for the convenience of their patrons. The cloak room was about twenty-two feet long and four feet wide, and dimly lighted. Inside the cloak room was a trap door about four feet wide and eight feet long. Beneath the trap door were eight or nine steps leading to the cement floor of the basement about eight feet below the cloak room. Early in the morning of December 9, 1945, while reaching for some wearing apparel belonging to one of the defendants' patrons, plaintiff fell through the open trap door into the basement, causing the injuries here complained of.

Several weeks before the occurrence defendant Steve Harris had granted to one George Aldrich "a concession to take pictures" of defendants' patrons and constructed a darkroom in the basement of the premises, where Aldrich developed the pictures. Before the darkroom was built Aldrich developed his films in a trailer parked outside of the building. At that time he used a basement door as a means of ingress and egress. Aldrich employed a girl assistant to photograph defendants' patrons. On the night of the occurrence the basement door which had been used heretofore was obstructed and the girl photographer passed the exposed films through the slightly opened trap door to Aldrich. After taking several pictures of patrons the girl photographer would signal Aldrich by tapping on the trap door, whereupon Aldrich would open it several inches to receive the exposed films which he immediately developed in the darkroom. On some occasions the girl photographer opened the trap door, walked down the stairs and delivered the films to Aldrich. Just before the accident Aldrich had fully opened the trap door without the knowledge of the plaintiff while she was in the cloak room. At that moment, as plaintiff was reaching for some coats she stepped back and fell through the trap door opening.

The complaint was framed on the theory of ordinary common law negligence. Defendants filed an answer denying negligence on their part. They also alleged as a special defense that defendants and plaintiff were at the time of the accident subject to the provisions of the Workmen's Compensation Act. Plaintiff filed a reply.

Defendants urge that they are subject to the Workmen's Compensation Act because engaged in a business which is by that Act declared to be extra hazardous under clauses 1 and 7-1/2 of §3, chapter 48, Paragraph 139, Ill. Rev. Stats. 1949, Illinois State Bar Asso. Edition. Since issues were joined on the special defense the burden of proof on these issues was on defendants. Victor v. Dehmlow, 405 Ill. 249; Mueller v. Elm Park Hotel Co., 391 Ill. 391.

There is a sharp conflict in the evidence as to the kind of utensils and equipment used by defendants in their business. Defendant Steve Harris testified that there were compressors in the basement for the ice box and the deep freeze in the kitchen and another for the bottled beer box under the bar; that these compressors were of different sizes and driven by electric motors ranging from 3/4 to 2-1/2 horsepower; that the main switch carried 150 amperes and about 2000 volts; that the sump pump in the basement was about 4 feet high, 12 feet wide at the base and 8 feet at the top; that the kitchen was equipped with meat cleavers and saws, butcher knives, and a meat slicer operated by a motor; that the blade of the slicer was circular and about 14 inches in diameter; that he also had a meat grinder of "fair size"; that a 30-inch exhaust fan in the kitchen was operated by a 3/4 horsepower electric motor; and that the gas heating units hung from the ceiling had electrically operated blowers.

Angelo Geldes, a bartender, testified that there were five machines with electric motors "lined up against the wall" in the basement and also a motor operating a slicing machine in the kitchen.

Charles Martiny, also one of defendants' bartenders called by the plaintiff, testified that there was an exhaust fan in the kitchen with blades from 18 inches to 2 feet in diameter, an old manually operated meat-slicing machine, and two refrigerators in the kitchen, the largest being about 20 to 25 cubic feet; that the motor-driven cooling units of these refrigerators were in the kitchen and attached to the refrigerators. Martiny also testified that there were meat cleavers, a chopping block, and a meat saw; that the meat grinder was of the type used in the home; that the motor-driven cooling unit for the beer cooler was right behind the bar; that on December 8th and 9th, 1945 there was a small obsolete sump pump in the basement; and that there was "no equipment to speak of in the basement."

E. F. Gronhauser, a meter supervisor of the Public Service Company which furnished the electric power to defendants' premises, testified that there was only one meter in the premises, of 24 amperes and 240 volts; that this meter was "the same type of voltage used in residences throughout that territory."

Defendants argue that the question whether the Industrial Commission had exclusive jurisdiction of the subject-matter of this litigation presented a question of law and that the trial court erred in submitting this question to the jury for determination. In the oral argument before this court and in the briefs defendants' counsel conceded that instructions were given to the jury on this question. No complaint is made that any of these instructions did not correctly state the law governing this case. In view of the

conflicting testimony with respect to the equipment and utensils defendants used in their business, this question was properly presented to the jury. The jury could find that the electrical refrigerators, meat cleavers, saws, hand operated meat slicer, grinder, and other utensils and implements used were such as are ordinarily found in private homes.

Defendants say that because they employed a janitor and a porter and built a dark room their business is brought within the purview of the Act. This contention is without merit. Where a building is maintained, equipped, and used by its owner in conducting a business in which he is engaged, as an incident or adjunct to the business, the relation of his business to the Workmen's Compensation Act and his relation to his employees is to be determined by the business and not by the maintenance of the building. Jacobi v. Industrial Com., 342 Ill. 210. Manifestly the jury believed plaintiff's evidence as to the equipment and utensils in use by defendants at the time of the accident. That evidence we think is sufficient to show that plaintiff and defendants were not under the Act.

Defendants insist that plaintiff has failed to prove a cause of action and that she was guilty of contributory negligence. As stated in our former opinion, it was the duty of defendants to use reasonable care to furnish plaintiff a safe place to work, and they could not delegate that duty to another so as to relieve themselves of liability for an injury resulting from a failure to perform the duty. Raxworthy v. Heisen, 274 Ill. 398.

According to plaintiff's testimony, so far as she knew the trap door was used for the first time on the night of the accident for the purpose of delivering exposed films to Aldrich; and that no warning was given to plaintiff when the door was opened. Defendant Steve Harris admitted that he knew Aldrich and his assistant photographer were using the trap door for the purpose of delivering exposed films, and "permitted it."

From a careful reading of the record we are of the opinion that the evidence is ample to support a finding that defendants had failed to furnish plaintiff a safe place in which to work, and that she was not guilty of contributory negligence.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J., AND FEINBERG, J., CONCUR.

45572

WILLIAM H. ATTSCHULER, Appellee, v. MARSHALL BERLIN and C. S. BERLIN, copartners d/b/a MARSHALL-WHITE COMPANY, Appellants.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment for $5,000 entered on the finding of the court in an action on an oral agreement for engineering services rendered in designing and developing a plastic silverware chest. Defendants' motions for a directed verdict at the close of the plaintiff's case and for a judgment notwithstanding the verdict were overruled.

Plaintiff, an engineer, filed an amended complaint consisting of two counts. The first count alleged in substance that about March 1, 1945 plaintiff and defendants represented by one Albert J. Sloan, their duly authorized agent, entered into an oral agreement to render engineering and other services in the design, development, manufacture and distribution of a plastic silverware chest; that defendants agreed to bear all costs incurred in development of the chest and to give plaintiff an option to provide an assembly shop to manufacture and assemble the linings and trimmings of the chest at a profit of 20 per cent over the cost of material and manufacturing and to pay plaintiff a royalty of 10 cents on each chest, with a maximum royalty

of $10,000; that plaintiff gave his design and blueprints of the silverware chest to defendants; that during the period from the month of March to August 1945 plaintiff acted in an advisory capacity in the design, development, and production of the chest; that in August 1946, at Sloan's request, plaintiff agreed to release the defendants from the option to manufacture and assemble a portion of the chest; and that in March 1947 plaintiff agreed to accept the sum of $5,000 in full payment of his services.

The allegations of the second count are substantially the same as the first except that plaintiff seeks to recover for the reasonable value of his services which he alleges in this count is $10,000.

Defendants answered that Sloan was not authorized to make the alleged contract with plaintiff; and that they had no knowledge of the alleged oral agreement between Sloan and the plaintiff.

Plaintiff filed a reply denying the averments of the answer.

As grounds for reversal defendants urge that plaintiff failed to establish a prima facie case and the court erred in denying defendants' motion for a new trial and for judgment notwithstanding the verdict.

The Marshall-White Company, a partnership, consists of Mrs. Irving S. Berlin and her son Marshall Berlin. Irving S. Berlin is president of I. S. Berlin Press, the Certified Printing Company, and the Marshall-White Press, all Illinois corporations. Irving S. Berlin also directed

the affairs of the partnership here involved, the Marshall-White Company.

From about 1940 to 1944 Sloan had been employed in one of Irving S. Berlin's printing companies. In 1944 Berlin placed Sloan in charge of the Marshall-White Company. He was the only employee. Counsel for defendants stipulated that Sloan had the "exclusive agency" for the partnership and that if Irving S. Berlin had authorized Sloan to enter into the alleged oral agreement with plaintiff, defendants would be bound.

According to Sloan when the partnership was formed Irving Berlin told him that he was to have "complete charge." Sloan's compensation was fixed at $7,500 a year, 38 per cent of the profits, and all expenses. Neither of the defendants was active in the partnership enterprise. In the upper left-hand corner of a letterhead of the Marshall-White Company, introduced in evidence as one of plaintiff's exhibits, appears the name of "Albert Sloan--Vice President." No other names of officers of the partnership are on the letterhead.

Sloan further testified that in the spring of 1945, after plaintiff had exhibited to him some drawings the plaintiff had made of the silverware chest, Sloan asked plaintiff to "let my company handle the promotion of the chest for a fee." On the following day Sloan told Berlin about the drawings of the plastic chest and his request that plaintiff permit the Marshall-White Company to promote the sale of them. Berlin directed Sloan to "go ahead and do whatever you want."

From time to time as the silverware chest was being developed Berlin inquired of Sloan about the "various costs." In the meantime Sloan also employed other persons to assist plaintiff in designing the "artistic" features. The evidence shows that when changes were made in the design of the chest the manufacturing costs increased and then Sloan negotiated with the plaintiff to modify the terms of the original oral agreement with respect to his compensation. In February or March of 1947 at Berlin's suggestion plaintiff agreed to accept an offer of $5,000 for his services.

Plaintiff testified in substance that in 1944 he met Sloan at a social gathering where plaintiff told Sloan that he intended to manufacture and sell plastic silverware chests; that Sloan stated to plaintiff that he was interested in a chest of that kind; that some time in March 1945 plaintiff made a blueprint of the chest which he gave to Sloan; that early in 1946, at Sloan's office, plaintiff met persons engaged by Sloan who had prepared a chest design for its "artistic value"; that because of this added expense Sloan asked plaintiff, and plaintiff agreed, to reduce the royalty on each chest to five cents; and that afterwards plaintiff agreed to modify the agreement by permitting defendants to have the assembling of the chest done elsewhere.

Plaintiff further testified that the final negotiations between Sloan and the plaintiff resulted in plaintiff accepting an offer of a "flat fee" of $5,000 for all his services.

Armand Oppenheim, called by plaintiff, testified that he was employed by Sloan as a production expediter of the silverware chest; that during his employment by the defendants from March 1946 to July 1947 he prepared several cost estimates of the chest including engineering and design; that these estimates were submitted to Berlin and two of his employees, Andrew Martin and Hyman Mash; that the first cost estimate included engineering costs representing a stipulated amount for plaintiff and that the other cost estimates also had a "figure of payment" to plaintiff at five cents a chest which Sloan had directed the witness to insert in the cost estimate.

Irving S. Berlin testified that plaintiff's name was never mentioned to him during the negotiations relative to manufacture of the chest; that he did not know Sloan had made an agreement with plaintiff; that he had never seen or heard of the plaintiff; that he knew Sloan "held himself out" as vice president of the Marshall-White Company; and that Sloan's salary was $150 weekly, 38 per cent of the net profits of the partnership, and expenses.

Andrew R. Martin, comptroller of the I. S. Berlin Press and the Marshall Press, testified that he supervised the books and records of the Marshall-White partnership; that he did not know plaintiff; that no liability was ever shown on the books of the defendants' partnership for compensation due plaintiff; and further that he was not present at a meeting when Berlin was shown a cost estimate of the manufacture of the chest which included the fees due plaintiff.

Another of Berlin's employees, Hyman Mash, testified that he was an assistant to Berlin in the defendants' partnership and also vice president in charge of sales of the Marshall-White Press; that the name of plaintiff was not mentioned by Sloan in connection with the plastic chest; that he had seen plaintiff in Sloan's office in 1945 or 1946 but that he had never had any conversation with him.

From an examination of the record, consisting of more than seven hundred pages, we think there is ample evidence to support the following findings: That Sloan, acting in behalf of the defendants, had authority to employ plaintiff; that Sloan made an oral agreement with the plaintiff as alleged in the complaint; and that the terms of the agreement were afterwards modified allowing plaintiff $5,000 in full of all services. Under the facts and circumstances shown by the evidence, defendants' motions for a directed verdict, a new trial, and for a judgment notwithstanding the verdict were properly denied.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J., AND FEINBERG, J., CONCUR.

224 A

45667

PHIL S. ROE, Plaintiff - Appellant, v. JOHN A. COOKE, individually and as Former Joint Adventurer with Plaintiff, Defendant, FRANK J. QUIRK and THOMAS J. QUIRK, individually and as Co-executors of the Estate of Bridget Quirk, deceased, Defendants - Appellees.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing defendants Frank J. Quirk and Thomas J. Quirk from this cause and vacating an injunction in an action to recover attorney's fees earned in certain legal proceedings.

According to the allegations of the complaint plaintiff and defendant Cooke, both attorneys, became associated in a joint adventure, representing among others Frank J. Quirk and Thomas J. Quirk as co-executors of the Estate of Bridget Quirk, deceased, in legal proceedings in the Probate, Superior, and Circuit Courts of Cook County. The Quirks as co-executors were authorized and directed by court order to pay Cooke and Roe $5,500 in full payment of certain legal services. After the Quirks had paid Cooke and Roe the sum of $2,300 Cooke induced defendant Thomas J. Quirk to deliver to him a check for the balance of $3,200 made payable to defendant Cooke, for fees due and owing to Cooke and Roe.

The complaint further alleges that Cooke concocted a plan to defraud plaintiff out of his part of the fees and combined, confederated, and conspired with defendant Thomas J. Quirk to prevent plaintiff from receiving his share of said fees; that the Quirks were in open court when an order was entered directing them to pay the balance of fees due Cooke and Roe; that they had full knowledge of plaintiff's interest in the fund; and that they knew of the fiduciary relationship existing between defendant Cooke and plaintiff and aided and assisted Cooke in defrauding plaintiff of his fees.

The complaint concluded with a prayer for an injunction enjoining Cooke from collecting or settling any obligation owed to plaintiff and Cooke from the Quirks as co-executors, and enjoining defendants from taking further steps to close the estate of Bridget Quirk, deceased, until the further order of the court.

Defendant Cooke answered the complaint and filed a counterclaim. Plaintiff filed a reply.

June 22, 1951 an order was entered defaulting defendant Frank J. Quirk for failure to plead and that day plaintiff's motion to set the cause for hearing was continued to June 28, 1951. In accordance with a stipulation, an order was entered June 28, 1951 vacating "the defaults, if any, heretofore taken against" the Quirks, and granting them leave to "answer or otherwise plead to the complaint within fifteen days from the date hereof." On the same day (June 28, 1951) the order here appealed from was entered, the pertinent part of which reads: "It is ordered the defendants

Thomas J. Quirk and Frank J. Quirk be and are hereby dismissed as defendants in this case and the injunction issued as to their closing the estate of Bridget Quirk is hereby dissolved and quashed; plaintiff's objection and exception to this order is hereby overruled."

In this court none of the defendants has filed an appearance or brief. So far as the record shows no motion was filed in the trial court challenging the sufficiency of the allegations of the complaint. The complaint is framed on the theory that plaintiff and defendant were joint adventurers when they earned the fees here in controversy and that the Quirks conspired with Cooke in defrauding plaintiff.

In general joint adventures have the legal incidents of a partnership and, while it is said that a joint adventure is not regarded as identical with a partnership, the relation of the parties is so similar that their rights and liabilities are usually tested by the same rules which govern partnerships. Ditis v. Ahlvin Construction Co., 408 Ill. 416. To the same effect see Hagerman v. Schulte, 349 Ill. 11, and Grossberg v. Haffenberg, 367 Ill. 284. In the instant case at the time the order here appealed from was entered the cause was at issue as to defendant Cooke and the Quirks time to answer or plead had not expired. The record fails to show that any pleading or affidavit was filed in support of a motion to dismiss the Quirks. Nor does it appear that any issue of law or fact was determined when the order here complained of was entered. In this state of the record we are impelled to reverse the order.

For the reasons given, the order is reversed and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED.

KILEY, P.J. AND FEINBERG, J., CONCUR.

Approved Dan T. Anderson

2753 A

Gen. No. 10565 Agenda No. 20

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT 341 I.A. 577

- - -

February Term, A. D., 1952

MAUD SCHLAFMAN, Administratrix of the Estate of Frederick Schlafman, Deceased, Plaintiff-Appellee, vs. PAUL F. O'NEIL and THOMAS J. O'MALLEY, Jr. (PAUL F. O'NEIL, Appellant) Defendants.	Appeal from the Circuit Court of Ogle County.

Dove, P. J.

One month after the death of Frederick Schlafman, a farmer, which occurred on October 14, 1945, his widow, Maud Schlafman, was duly appointed by the county court of Ogle County the administrator of his estate. Paul F. O'Neil and Thomas J. O'Malley, Jr., were partners engaged in the general practice of law with offices in the National Bank Building in Rochelle, Illinois, and were employed by Mrs. Schlafman to probate her husband's estate. At the time of the death of Mr. Schlafman, Paul F. O'Neil was in the army but returned to his office in February, 1946. On March 28, 1946, a petition to sell, at public sale, the farm machinery, live stock, and other personal

Dave, P. J.

One month after the [illegible] foreclosure sale, a farmer, which [illegible] Scottsville, was sold at [illegible] by the county court of Ogle County the administrator of [illegible] Neil and Maria L. O'Neill, Sr., were [illegible] in the general practice of law with offices in the [illegible] Illinois, and were employed by the [illegible] to probate her husband's estate. At the time of the death of Mr. Scottsville, Paul F. O'Neill was in the army but returned to his office in February, 1946. On March 25, 1946, a petition to sell, at public sale, the farm [illegible], five stoves and other personal

property of the deceased to pay the claims against the estate was executed by the administratrix, sworn to before Mr. O'Neil as a Notary Public and filed with the Clerk of the County Court, and the following day an order was entered granting the prayer of the petition. The order provided that the property be sold for cash, free and clear of the lien of the chattel mortgage to Robert P. Sheaff and that so much of the proceeds arising from the sale as may be necessary to satisfy the lien of Robert P. Sheaff be paid to him.

On April 2, 1946, the sale was had at the country home of the administratrix, and, after deducting the expenses thereof, $4233.25 remained. Mr. O'Neil was present at the sale, and Mike Typer was the sales clerk. Mrs. Schlafman introduced Mr. O'Neil to Mr. Typer and told him that Mr. O'Neil was a member of the legal firm of O'Neil and O'Malley and that he represented her in the settlement of her husband's estate. At the conclusion of the sale, Mr. Typer asked Mr. O'Neil how he should make out the check and Mr. O'Neil told him to make it payable to O'Neil and O'Malley, and this was done and a check for $4233.25 was delivered to Mr. O'Neil by Mr. Typer. The following day Robert P. Sheaff and Mr. O'Malley came to Mr. Typer and told Mr. Typer that the deceased was indebted to Mr. Sheaff and that Mr. Sheaff "would call the account square for $2500.00." Thereupon the check for $4233.25 issued by Mr. Typer the day before was returned to him and in lieu thereof Mr. Typer issued two checks, one for $2500.00 payable to the order of Robert P. Sheaff, which was delivered to Mr. Sheaff,

property of the deceased [illegible] of the [illegible] estate was executed by the administrator, [illegible] over to [illegible] [illegible] as a Notary Public for the [illegible] of the county court, and the following day an order was entered [illegible] the payment of the petition. The order [illegible] for cash, free and clear of [illegible] Robert [illegible] Sheaff [illegible] so much of the proceeds [illegible] from the sale as may be necessary [illegible] the liens of [illegible] Sheaff be paid to him.

On April 7, 1926, [illegible] of the administratrix, and [illegible] $4825.05 received, [illegible] payment of the sale, and also Typer was the [illegible] clerk. [illegible] to Mr. Typer and told him [illegible] legal fees of [illegible] the settlement of her [illegible] the remaining of the sale, Mr. Typer asked Mr. [illegible] and Mr. O'Neill told him [illegible] O'Neill and [illegible] and the [illegible] was done and a [illegible] delivered to Mr. O'Neill by Mr. Typer. The [illegible] Sheaff and Mr. O'Neilly came to Mr. Typer and told Mr. Typer that the deceased was indebted to Mr. Sheaff [illegible] would call the account square for $250.00." Thereupon the check for $4825.05 issued by Mr. Typer the day before was returned to him and in lieu thereof Mr. Typer issued two checks, one for $250.00 payable to the order of Robert R. Sheaff which was delivered to Mr. Sheaff,

and another check for $1733.25 payable to the order of O'Neil and O'Malley, which was delivered to Mr. O'Malley. The check payable to Mr. Sheaff was endorsed by him and duly paid by the bank on which it was drawn on April 8, 1946, and the other check was endorsed by O'Neil and O'Malley and deposited to their credit in the Northern Trust Company in Chicago and duly paid by the bank on which it was drawn on April 6, 1946.

No report of this sale was ever filed in the county court. The partnership of O'Neil and O'Malley was dissolved on December 1, 1946, and at that time the money was in the partnership account in the Northern Trust Company. The administratrix never received any of the proceeds of the sale, and, subsequently, Mr. O'Malley was disbarred from the practice of his profession.

On March 30, 1950, the instant complaint, consisting of two counts, was filed by Mrs. Schlafman, as administratrix, against Paul F. O'Neil and Thomas J. O'Malley. Count one alleged, among other things, her employment of the defendants to represent her in the settlement of her husband's estate, the preparation by them of the petition to sell the personal property of the estate, the entry of the order of sale by the county court, and the sale and the delivery of the check to defendants from the proceeds of the sale amounting to $1733.25 after the payment of the chattel mortgage. This count averred that the defendants had not accounted for that sum to the plaintiff and prayed for a money judgment against them for that amount. The second count alleged that the defendants wilfully and fraudulently converted to their own use the funds mentioned in count one and, likewise,

and another check for [illegible]
and O'Malley [illegible] Jolly [illegible]
payable to the order [illegible]
bank in which it was [illegible]
check [illegible]
their [illegible]
paid [illegible]
[illegible]
counsel. [illegible]
on December [illegible]
[illegible]
[illegible] or [illegible]
[illegible]
bile [illegible]ion.
[illegible]
[illegible]
[illegible]
sent [illegible]
tion by [illegible]
the [illegible]
and the [illegible]
the [illegible]
of the [illegible] [illegible] that the defendant
had not [illegible]
money [illegible] [illegible]
alleged [illegible]
to their own use the funds [illegible] one and, [illegible]

prayed for a money judgment. Both defendants were personally served with process, and the defendant O'Neil filed a motion to dismiss on the ground that a petition by the plaintiff for a citation was pending in the county court. This motion was denied, and this defendant then filed his answer in which he alleged that he was in the Armed Forces of the United States in October and November, 1945, and therefore does not have sufficient knowledge to either admit or deny the allegations of the complaint; that he never personally represented the plaintiff except to be present at the sale of personal property; that he did not receive any funds from the sale; that a notice of intention to dissolve the firm of O'Neil and O'Malley was sent to the plaintiff before December 1, 1946, and plaintiff made no objection to Mr. O'Malley, one of the partners, taking over the assets of the partnership; that all of the assets of the partnership were turned over to O'Malley with the knowledge of the plaintiff that he, O'Malley, would be solely responsible to the creditors of the partnership; that O'Neil did not know of any misappropriation of the funds of the plaintiff; that he did not misappropriate them and denies that he converted any funds of the plaintiff to his use. The plaintiff replied denying that O'Neil had nothing to do with representing the plaintiff; denying that he did not receive the proceeds of the sale; denying that she had any notice of the dissolution of the partnership or knew that the assets of the partnership had been turned over to O'Malley or that he had assumed any liability to her.

The issues made by the pleadings were submitted to a jury resulting in a verdict and judgment in favor of the plaintiff

[illegible] prayed for a money judgment. [illegible] served with process, and the defendant [illegible] to dismiss on the ground that [illegible] a citation was pending in the county court. [illegible] denied, and this defendant [illegible] alleged that he was in the [illegible] October [illegible] knowledge to either [illegible] that he never personally [illegible] present at the date of [illegible] any funds from the [illegible] the firm of [illegible] December 1, 1949, and plaintiff [illegible] one of the partners, [illegible] that all of the [illegible] O'Malley with the knowledge of [illegible] would be solely responsible [illegible] that O'Malley did not [illegible] the plaintiff; that he did not [illegible] that he conducted any [illegible] plaintiff replied [illegible] representing the plaintiff; [illegible] procedure of the case; denying that she had any notice of the dissolution of the partnership or knew that the assets of the partnership had been turned over to O'Malley or that he had assumed any liability to her.

The issues made by the pleadings were submitted to a jury resulting in a verdict and judgment in favor of the plaintiff

and against both defendants for $1733.25. To reverse this judgment Paul F. O'Neil appeals.

It is insisted by counsel for appellant that his motion for a directed verdict at the close of all the evidence should have been granted because the complaint alleged that there was a sum of money derived from the proceeds of the sale after the Sheaff mortgage was paid belonging to the plaintiff while the proof disclosed that the Sheaff mortgage was never paid. What the complaint alleged was that as a result of the sale there was available in cash $1733.25 to the plaintiff, as administratrix, after the payment of expenses and a chattel mortgage. The evidence of Mr. Typer was that Mr. Sheaff held the chattel mortgage and that the day following the sale he, Sheaff, came to Typer, the sale clerk, and told him he would call the account square for $2500.00. One of the defendants representing the plaintiff said that was agreeable, and, as a result of the arrangement there made, a check for $2500.00 was handed to Sheaff, and the balance remaining in Typer's hands derived from the sale after the payment of expenses and satisfying the Sheaff chattel mortgage amounted to $1733.25 and a check for this amount was delivered to one of the defendants. The proof sustained the allegations of the complaint, and there was no substantial variance between the allegations of the complaint and the proof offered.

It is also insisted that the court erred in giving the following instruction to the jury: "The court instructs the jury that the personal property of the decedent vests upon his death

and against both defendants on [illegible]. To reverse this judgment that F. [illegible] appeals.

It is insisted by counsel [illegible] that the motion for a directed verdict [illegible] should [illegible] there was a sum of [illegible] after the sheriff mortgage [illegible] while the proof [illegible] paid. [illegible] the [illegible] said there was [illegible] administrator after the [illegible] mortgage. The evidence [illegible] charged mortgage and [illegible] came to Upper, the [illegible] account [illegible] the plaintiff and that [illegible] amount of the arrearages [illegible] and the balance remaining [illegible] after the payment of [illegible] mortgage amounted [illegible] was delivered to one of the def[illegible] allegations of the [illegible] variance between the [illegible] offered.

It is also insisted that the court erred in giving the following instruction to the jury: "The court instructs the jury that the personal property of the decedent vests upon his death

in his executor or administrator for the purpose of administration and that such personal property or the proceeds of any sale thereof is taken by such administrator or executor in trust for the payment of the debts of the decedent and the distribution of the remainder among his next of kin." Counsel argue that the personal property involved in this proceeding was covered by the Sheaff chattel mortgage and, therefore, the title thereto was in him and not in decedent and that the proceeds of the sale belonged to Sheaff. The evidence found in this record discloses that Sheaff, the mortgagee, consented to this sale by the administrator and after the sale accepted $2500.00 from the proceeds of the sale and also certain cattle upon which he had a chattel mortgage and which were not sold by the administrator. The mortgagee accepted this money and cattle in full payment of the amount due upon the obligation of the decedent which was secured by a chattel mortgage. When the mortgagee consented to the sale his lien upon the property covered by his chattel mortgage was lost. (Elzy v. Morrison, 180 Ill. App. 711, 716). The legal title to personal property of an intestate does vest in the administrator as trustee for the payment of debts and when the debts are paid, for distribution to the heirs. (Furst v. Brady, 375 Ill. 425, 432; Weiland v. Weiland, 297 Ill. App. 239, 243). There was no reversible error in giving this instruction.

It is also insisted that the court erred in refusing to give to the jury this instruction: "The Court instructs you that a partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between

in his executor or administrator for [illegible] of administration and that such required [illegible] any sale thereof is taken by such [illegible] for the payment of the debts of [illegible] tion of the partnership among [illegible] that the property [illegible] covered by the usual [illegible] thereto was in his [illegible] the sale mortgage to [illegible] disclosure [illegible] the administrator [illegible] proceeds [illegible] obtained [illegible] The mortgagee [illegible] the account [illegible] secured by a [illegible] the sale [illegible] mortgage was lost. [illegible] The legal title to personal property [illegible] the administrator [illegible] the debts are paid, for [illegible] Fredy, [illegible] 243). There are [illegible] this transaction.

It is also [illegible] to relating to give to the jury this instruction: "[illegible] instruct you that a partner is discharged from any [illegible] solution of the partnership by an agreement to that effect between

himself, the partnership creditor and the person or partnership continuing the business, and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business. You are further instructed in this regard that if you believe from the evidence that before the 30th day of November, 1946, Paul F. O'Neil, the defendant herein, caused to be sent out and the plaintiff received a notice that the partnership of O'Neil and O'Malley was to be dissolved on the 30th day of November, 1946, and said notice called upon the plaintiff herein to take exception to such dissolution before December 15, 1946, and stated that if no exception was taken before said date Paul F. O'Neil would be relieved of the liabilities of the partnership, and if you further believe from the evidence that the plaintiff herein took no exception to this arrangement and continued to do business with Thomas J. O'Malley, Jr. after December 15, 1946, then you may infer from the course of dealing between the plaintiff herein and Thomas J. O'Malley, Jr. that the plaintiff herein agreed that Paul F. O'Neil was to be discharged from the claim herein sued upon." The vice of this instruction is that it assumes that the partnership of O'Neil and O'Malley had been dissolved by an agreement between the members of the partnership, the plaintiff and the partner continuing the business. There is no evidence found in this record to sustain this assumption, nor is there any evidence that plaintiff continued to do business with defendant Thomas J. O'Malley, Jr., after December 15, 1946. The instruction was

himself, the partnership agreement and the person or partnership continuing the business, and such agree out may be inferred from the course of dealing between the proposed having knowledge of the dissolution and the person or partnership continuing the business. You are further asked to bear in mind that if you believe from the evidence that before the [illegible] day of November, 1940, Paul R. O'Neill, the defendant herein, ceased to be sent out and the plaintiff [illegible] that the partnership of O'Neill and O'Malley [illegible] of November, 1940, and said notice [illegible] hereon to take [illegible] 1940, and state that if [illegible] Paul R. O'Neill [illegible] partnership, and [illegible] the plaintiff [illegible] continues to do [illegible] December 1a, 1940, [illegible] between the [illegible] the plaintiff [illegible] charges from [illegible] instruction [illegible] and O'Malley [illegible] members of the partnership, the [illegible] continuing the business. There is no evidence found in this record to sustain this [illegible], nor is there any evidence that plaintiff continued [illegible] business with [illegible] O'Malley, Jr., after December 1a, 1940. The instruction was

properly refused. (McCusker v. Curtiss Wright Flying Service, Inc., 269 Ill. App. 502,508; Wood v. Dillon, 329 Ill. App. 16,22).

It is finally insisted that the trial court erred in overruling appellant's motion to dismiss the complaint, which motion alleged that there was a petition for citation involving the same matters alleged in the complaint pending in the estate proceedings in the County Court of Ogle County. The record shows that after the trial court denied this motion, appellant filed his answer, and the matters alleged in his motion to dismiss were not embraced in his answer. Furthermore, just what relief the petition for citation in the County Court sought does not appear from the abstract furnished by appellant. The only reference to this motion in the abstract is: "Motion to dismiss and affidavit filed by O'Neil stating that a petition for citation on this transaction was pending in County Court. Motion to dismiss overruled."

We find no reversible error in this record, and the judgment of the circuit court is therefore affirmed.

Judgment affirmed.

properly refused. (McCumber v. [illegible] Flying Service, Inc., 289 Ill. App. 324,326, [illegible] 2d Ill. [illegible], 16,20 .

It is finally insisted that the trial court erred in overruling appellant's motion [illegible] the complaint, which motion alleged that there was a [illegible] action involving the same matters alleged in the [illegible] pending in the [illegible] proceedings in the County [illegible] the [illegible] that after the trial court [illegible] excellent [illegible] his answer, and the [illegible] were not embraced in [illegible] the petition for [illegible] appear from the abstract [illegible] reference to this motion in [illegible] and affidavit filed by [illegible] on this transaction was [illegible] wise overruled."

We find no reversible error [illegible] judgment of the circuit court [illegible] affirmed.

Judgment affirmed.

2762 A

Abstract

Gen. No. 10575 Agenda No. 9

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1952 343 I.A. 577

FRANK MORGAN, Plaintiff-Appellant,	)	
vs.	)	Appeal from the County Court,
HENRY J. MEISTER, Defendant-Appellee.	)	Marshall County, Illinois

ANDERSON -- J.

Frank Morgan, plaintiff-appellant is a licensed real estate broker. He filed his complaint at law in the County Court of Marshall County, Illinois, said complaint claiming damages from Henry J. Meister, defendant-appellee for a real estate commission. The cause went to trial, and at the close of appellant's case, appellee presented a motion to find the issues for the appellee. Appellee stood on the motion, and introduced no evidence. The court allowed the motion. Appellant has perfected his appeal, and claims that the court erred in finding the issues for appellee, and that the court should have entered judgment for appellant in the amount of $600.00 and costs.

All of the evidence was introduced by appellant. The facts appear clear. Appellee and his wife owned a farm. Appellee and appellant entered into a listing agreement, which reads as follows:

"To Frank Morgan:

"You are hereby authorized to offer my property for sale, the same being situated in Sections 25 & 36 T. 13-N, R 9 E Marshall Co.,

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

TERM, A. D. 1937

FRANK MORGAN, Defendant-appellant,	
vs.	"appeal" from the
HENRY J. MEIGERT, Plaintiff-appellee.	Bonds County, Illinois

AFFIRMED -- 1.

Frank Morgan, defendant-appellant in Liberty Trust & Savings Bank, appellee, filed his complaint on [illegible] County Court of Bond, Illinois, said complaint and the [illegible] from Henry J. Meigert, defendant-appellee for a real estate commission. The cause went to trial, and at the close of appellant's case, appellee presented a motion to find the issues for the appellee. Appellee's motion was sustained, and introduced no evidence. The court also [illegible] motion. Appellant has prosecuted his appeal, and claims that the court erred in finding the issues for appellee, and that the court should have entered judgment for appellant in the amount of $600.00 and costs.

All of the evidence was introduced by appellant. The facts appear clear. Appellee and his wife owned a farm. Appellee and appellant entered into a listing agreement, which reads as follows:

"To Frank Morgan:

"You are hereby authorized to offer my property for sale, the same being situated in Sections 25 & 36 T. 13-N, R 3 W. Marshall Co.,

Illinois containing 145 acres.

"The sale price is agreed to be $20,000, on terms and conditions as follows: A cash or down payment in the amount of $2,000 or more, and the balance on Mch 1st 1951, at which time possession is to be given.

"Upon fulfillment of above, I agree to convey the property by a good and sufficient warranty deed, free of all encumbrances, and furnish a merchantable abstract of title to the same.

"Taxes shall be pro rated to date of possession.

"This listing shall be in force 90 days from this date, and shall extend thereafter until cancelled by a written notice from the owner, with agent given notice ten (10) days in advance of date of termination. The commission shall be 3% per cent of the amount for which the property is sold.

"Signed at Henry, Illinois, this 27th day of May 1950.

Henry J. Meister"

It will be noted that the listing agreement was executed on May 27, 1950. Appellant testified that in September of 1950, he acquired an offer of $16,000.00 for the farm. A little later he acquired an offer of $18,000.00. In February of 1951, he had an offer of $19,000.00. All of these offers were communicated by appellant to appellee. Appellee's response thereto was, "You have got to get the $20,000.00." Appellant testified that "around" March 1, 1951, he acquired a $20,000.00 offer for the farm, and advised appellee that he had the farm sold for $20,000.00. Appellant testified that he gave this information to appellee in the local park, and that appellee replied, "I guess it's gone; I will see you in a few days." On or about March 27, 1951, appellant and the prospective purchaser went to appellee's home and handed a $2,000.00 check to him. Appellee pushed it back and said, "I'll see you in a few days." Appellant received the following

letter from appelled on or about April 1, 1951:

"April 1th 51

"Dear - Frank --

"I, am writing to you about the farm. Mabel said she wont sine the deed so I guess it all over as far. that so I think we will dope the hole deal It is for best I guess a that

"Your truly

H. J. Meister"

Appellant contends in this appeal that he performed pursuant to the listing agreement as the listing continued until terminated by appellee, and that appellee failed to terminate the listing agreement until the April 1 letter, as hereinabove set forth. Appellant contends that prior to April 1, 1951, he had furnished a purchaser, pursuant to the listing agreement, who was willing to pay the amount of money demanded by appellee for the farm. Appellant further contends that there was an extension or waiver of the time limit set forth in the listing agreement, either by virtue of the conduct of appellee or appellee's knowledge of appellant's continued efforts to procure a purchaser, and his failure to affirmatively notify appellant of the termination of the listing agreement prior to the time that the purchaser was produced.

Appellee contends that the listing agreement terminated by its own terms, in that it provides specifically that a purchaser willing to pay $20,000.00 must be produced on or before March 1, 1951, and that neither his conduct or his knowledge and subsequent failure to act constituted an extension or waiver of this condition precedent to performance by appellant.

The time fixed in this contract for the payment of the balance of the purchase price, and the giving of possession, were clearly x conditions

letter [illegible]

"Dear - Frank --

"I, am [illegible]

deed so I [illegible]

real. It is [illegible]

Appellant [illegible]

listing agreement [illegible]

and right appellee [illegible]

April 1 letter. [illegible]

to April 1, 1967, [illegible]

agreement, [illegible]

for the term. [illegible]

waiver of [illegible]

virtue of the [illegible]

continued efforts [illegible]

notify appellee [illegible]

time that [illegible]

Appellee [illegible]

terms, in that it [illegible]

$20,000.00 [illegible]

his conduct or his [illegible]

extension or waiver of this [illegible]

The time [illegible] in this [illegible]

the purchase price, and [illegible]

precedent to performance by appellant. The listing agreement by its own terms was not subject to being performed by appellant after March 1, 1951.

The primary question before this court appears to be whether or not appellee committed any acts which excused or waived this condition precedent to performance by appellant, to-wit: a purchaser who would pay $20,000.00 on or before March 1, 1951.

Further consideration must be given to the testimony in the record concerned with appellee's conduct in this regard. The entire testimony of appellee's conduct prior to March 1, 1951, consists of reported offers by appellant less than the $20,000.00 figure, and the only thing that appellee said before the March 1 date was "You will have to get the $20,000.00." It is obvious that this conduct cannot constitute a waiver or excuse of the condition.

Looking to appellee's conduct subsequent to March 1, it appears from the record that appellant testified that "around"March 1, 1951, he obtained an offer for $20,000.00 that he submitted to appellee, who said, "I guess it's gone; I will see you in a few days." The prospective purchaser who testified on behalf of appellant stated that this $20,000.00 offer was made on March 8, 1951. Thereafter, on March 27, 1951, the prospective purchaser and appellant went to the home of appellee, and tendered a $2,000.00 check as a down payment. Appellant testified that appellee said, "I'll see you in a few days." The prospective purchaser testified that appellee said that he didn't know what to tell them, and that he seemed undecided. Appellee refused to accept the $2,000.00 check. This is all of the evidence of conduct on the part of appellee which appellant contends constitutes an excuse or waiver of the condition precedent that appellant should produce a purchaser willing to pay $20,000.00, said payment to be made on or before March 1, 1951.

proceeded to performance by appellant. The hearing proceeded as if its terms was not subject to being varied by [illegible] appellant's [illegible].

The primary question [illegible] court [illegible] to [illegible] appellee committee may [illegible] to performance by appellant, [illegible] on or before March 1, 1951.

Further consideration may be given to the [illegible] concerned with appellee's conduct in this regard. [illegible] of appellee's conduct prior to March 1, 1951, [illegible] by appellant [illegible] said before the March 1 date [illegible] is obvious that this [illegible] condition.

Looking to appellee's [illegible] the record that [illegible] an offer for [illegible] its power [illegible] testified on behalf [illegible] on March 8, 1951. [illegible] and appellant went to [illegible] check as a down payment. [illegible] you in a few days." The [illegible] said that he didn't know what to [illegible] appellee refused to accept [illegible] of conduct on the part of appellee which [illegible] an excuse or waiver of the condition precedent that appellant should produce a purchaser willing to pay $20,000.00, said payment to be made on or before March 1, 1951.

Inasmuch as this cause comes before this court on an affirmative ruling by the trial court on a motion by appellee at the close of appellant's case to find the issues for appellee, the sole question before this court is whether or not there is any evidence, taken with its reasonable inferences and intendments most favorable to appellant, that tends to establish the essential elements of appellant's case.

We hold that payment of the $20,000.00 purchase price on or before March 1, 1951, was a condition precedent to performance by appellant. We further hold that there is no evidence in this record, taken with all its reasonable inferences and intendments most favorable to appellant, that tends to establish a waiver or excuse of this condition.

It is true that such a condition may be waived or excused, but it takes far more than the conduct appearing herein to constitute evidence of such a waiver. The very cases cited by appellant in his brief forcibly indicate the type of conduct required in this regard.

In the case of Lawson v. Black Diamond Coal Mining Co., Supreme Court of Washington, 102 Pac. 759, cited by appellant, the court found that appellant, through its president, "repeatedly urged the respondents to continue their services after the sixty day period."

In the case of Ice v. Maxwell, Supreme Court of Appeals of West Virginia, 55 S. E. 899, also cited by appellant, it appears at page 901 that "there is evidence tending to show that the plaintiff was permitted to continue in the employment of the defendants after the 28th day of February, and that he was, after that time, recognized as their agent. He states that he talked to Mr. Maxwell frequently in regard to the matter, and that it went along until up in the spring some time, on or about the 1st of March, and one time he was talking to Mr. Maxwell, who notified him that the

Inasmuch as this [illegible] come [illegible] by the trial court on a motion [illegible] at the close [illegible] case to find the issue for appellee, the sole question before this court is whether or not there is any evidence, taken with its reasonable inferences and intendments most favorable to appellant, that tends to establish the essential elements of appellant's case.

We hold that payment of the $[illegible] made on [illegible] March 1, 1951, was a condition precedent to performance by appellant. We further hold that there is no evidence in this record, taken with all its reasonable inferences and intendments [illegible] that tends to establish a waiver or waivers [illegible].

It is true that such a condition may be [illegible] waived, but it takes far more than the concept [illegible] evidence of such a waiver. The very cross [illegible] indicate the type of conduct required [illegible].

In the case of Lawson [illegible] of Washington, 102 Pac. 752, [illegible] through its president, [illegible] service after the sixty-day period."

In the case of [illegible] v. Maxwell, [illegible] 55 S. W. 899, also cited by appellant, [illegible] is evidence tending to show that [illegible] in the employment of the defendants [illegible] that he was. After that time, [illegible] he talked to Mr. Maxwell [illegible] went along until up in the month [illegible] and one time he was talking to Mr. Maxwell [illegible] that the

defendants were in a hurry to sell the land, and said that they had to raise about $16,000.00, and about the 1st of March he produced the purchasers."

The case of Bailey v. Padgett, Supreme Court of Alabama, 70 So. 637, also cited by appellant, merely states that there was evidence to show that the time limit was extended. The evidence in that regard is not set forth in the report of the decision.

Since finding a purchaser willing to pay $20,000.00 on or before March 1, 1951 was a condition precedent to performance by appellant, and since appellee did nothing which can be construed to be an excuse or waiver of such condition, the effect of the conduct of appellant on March 27, 1951, at the meeting at appellee's house, was merely that of an offer on the part of appellant; it may be construed in no other way, as the listing agreement could not be performed at that time. This offer would create no liability on the part of appellee unless accepted. There is no evidence in this record that such offer was accepted, and in fact all of the evidence indicates that it was rejected by appellee. We do not believe there was any testimony in the record showing that appellee intended to extend the time of sale beyond the period stated in the listing agreement. The actions of appellant in submitting later offers to appellee were only offers to appellee which he could then reject or accept as he desired. Where the offer was rejected there could be no liability.

Giving consideration to the foregoing, we hold that the trial court was correct in allowing the motion of appellee to find the issues for appellee at the close of appellant's case. The judgment of the lower court should be affirmed.

Judgment affirmed.

defendants were in a [illegible] to [illegible]
raise about $14,000.00, and [illegible] the [illegible] be [illegible].

The case of Bailey [illegible] v. [illegible], 7 [illegible] (N.Y.), also cited by appellant, [illegible] that the time limit [illegible] form in the record of the [illegible].

Since [illegible] March 1, 1921 [illegible] since [illegible] of such conditions, [illegible] at the [illegible] of appellant; it [illegible] court [illegible] on the part [illegible] that such [illegible] that it [illegible] in the record [illegible] beyond the [illegible] in submitting [illegible] he could then [illegible] there could be no liability.

Giving consideration to the [illegible] the trial court was correct in [illegible] the motion [illegible] the [illegible] appellee at the close of [illegible] the [illegible] court should be affirmed.

Judgment affirmed.

RESERVE BOOK

ILL. APP. UNPUBLISHED
OPIN.
VOL. 23 2d

83289

This reserve book is NOT transferable and must NOT be taken from the library ~~except when charged out for overnight use.~~

You are responsible for the return of this book.

DATE	NAME		
	Lynn Mitchell	944-7074	
4/1	Linda C Cole	752-4050	
4/10/79	Lucenie		
4/19/79	Chrisy	926-2468	
5-22-79	S. Brosnahan	943-0646	
6-20-79	Thomas Price	726-4080	
"	K Mulgrew	372-3009	
9/1	D [illegible]		
9/1	R. M. Anderson		
2/14	J. FRENDREIS	774-1038	